

# JUSTICE OF THE PEACE REPORTS

## VOLUME 117

### PRACTICE NOTE

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND DAVIES, J.)

Oct. 13, 1952

ORMSBY v. ORMSBY

*Husband and Wife—Reduction of maintenance by justices—Appeal to High Court—Failure of justices to supply to High Court statement of reasons for their decision—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 71 (3).*

Rule 71 (3) of the Matrimonial Causes Rules, 1950, provides that, in the event of an appeal in a case under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949: "The appeal shall be entered by lodging at the Divorce Registry two copies of the notice of motion. There shall be lodged at the same time two certified copies of the summons and of the order appealed against, two copies of the justices' clerk's notes of the evidence and two copies of the reasons of the justices for their decision".

A failure by the justices and their clerk to provide a complete and intelligible note of the proceedings and a statement of the reasons for the justices' decision is a dereliction of duty on their part.

APPEAL by the wife against the decision of Liverpool city justices on Jan. 16, 1952, whereby they reduced an award of maintenance payable to her under an order of Nov. 10, 1943.

The wife applied to the justices' clerk for the reasons for the justices' decision and received a reply which read:

"The magistrates did not give any reasons in writing for their decision in the case against your husband, and I am unable, therefore, to supply any 'reasons' for the purpose of your appeal."

The husband likewise made an application and received a similar reply.

The wife appeared in person.

*Pain* for the husband.

LORD MERRIMAN, P., in the course of his judgment, said: It is not a question whether the justices, either in writing or orally, gave their reasons at the time of the decision. What we are entitled to have—and we have repeatedly said that it is the duty of the justices' clerk to supply us with it—is a statement of the justices' reasons, which is a very different thing. Rule 71 (3) of the Matrimonial Causes Rules, 1950, is quite explicit on the subject. It is the duty of the appellant to provide

"two copies of the justices' clerk's notes of the evidence and two copies of the reasons of the justices for their decision."

The rule does not say the reasons which the justices gave in open court—the



reasons which they recorded in writing at the time. It says: "the reasons . . . for their decision." I am surprised that it is necessary to tell the clerk to the Liverpool city justices that that is his duty, and to remind him that it is his duty to provide an intelligible note of the proceedings and complete notes of the proceedings and of the orders made. In the circumstances it is impossible for us to deal with this matter, and, lamentable as it is to have to send the case back to the justices, we have no alternative.

DAVIES, J., said that he thought it right to read once more the well-known passage from the judgment of LORD MERRIMAN, P., in *Sullivan v. Sullivan* (1), where he said:

"I am about to make some general observations, and I hope they will receive sufficient publicity to ensure that they reach justices' clerks throughout the country. This is the third time during this batch of appeals that words to the above effect have been employed by a justices' clerk in response to the demand for the reasons for the justices' decision. For very many years past this court has insisted, in reported cases, and over and over again in unreported cases, that it is the duty of justices not merely to take a proper note of the evidence, but also, in the event of an appeal, to give this court a statement of the reasons for their decision. Justices are not, like judges of the High Court, obliged to give their reasons at the time of the decision. They are entitled to make the order, or decline to make the order, without giving reasons, but they are bound to give this court, in the event of an appeal, a proper and sufficient statement of the reasons upon which their decision was based. There should never be any difficulty whatever in doing so, for whether the court is or is not bound openly to express the reasons for its decision in court; whether it be the highest court in the land or the humblest and whatever its jurisdiction may be, no court can give a proper decision in any case without formulating to itself at the time of the decision the reasons upon which such decision is based. It is, therefore, no answer—(indeed, it is a defiance of this court)—for justices' clerks to state that no reasons were given in court for the decisions of the justices, and I wish to say quite plainly that if this court is treated in this way again after this warning, it may be necessary for us to consider what powers we have to ensure that the parties are not put to unnecessary expense owing to dereliction of duty on the part of justices' clerks. I have spoken plainly, and I intended to speak plainly, and I hope that on this occasion some notice will be taken of what we are saying. This case is a glaring example of the inconvenience which arises from this dereliction of duty. We are not going to decide the case; we are going to send it back for hearing by some tribunal which will carry out its duties properly, and, therefore, I propose to say as little as possible about the facts . . ."

*Appeal allowed.*

Solicitors: *Helder, Roberts & Co.*, agents for *John A. Behn, Twyford & Reece*, Liverpool (for the husband).

G.F.L.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND DAVIES, J.)

October 23, 1952

RICHARDS v. RICHARDS

*Husband and Wife—Persistent cruelty—Res judicata—Dismissal of summons—Fresh summons—Admission of evidence of incidents prior to first summons.*

On Jan. 31, 1952, justices dismissed the wife's summons alleging persistent cruelty by the husband. On May 27, 1952, the wife issued a further summons on the same grounds.

HELD: the conduct which was alleged to have occurred after Jan. 31 could only be judged in the light of the whole of the husband's course of conduct, and, therefore, on the hearing of the second summons the wife was entitled to adduce evidence of physical violence which occurred prior to the dismissal of her first summons on Jan. 31, 1952, even though on that date the conduct of which evidence was then given was held not to amount to persistent cruelty.

*Molesworth v. Molesworth* (1947) (112 J.P. 65) applied.

APPEAL by the wife against the dismissal on July 3, 1952, by the justices for the city of Coventry of her summons alleging persistent cruelty by the husband.

The parties were married in 1938. On Jan. 5, 1952, the wife took out a summons alleging persistent cruelty. This summons was heard by the justices on Jan. 31, 1952, when the wife gave evidence of physical violence on occasions dating from 1944 onwards. The summons was dismissed. On May 27, 1952, the wife took out the present summons, also alleging persistent cruelty. At the hearing of this summons on July 3, 1952, the justices refused to allow the wife to adduce evidence of physical violence between 1944 and Jan. 31, 1952, on the ground that the allegations relating to that period had been disposed of and that there was not sufficient evidence of cruelty since Jan. 31, 1952, to justify them in considering evidence of events that had taken place before that date. The wife's evidence was, therefore, limited to incidents which had occurred between Jan. 31, 1952, and the issue of the present summons on May 27, 1952, at the end of which it was submitted on behalf of the husband that there was no case to answer and the justices accepted the submission and dismissed the summons.

*D. R. Ellison* for the wife.

*Moylan* for the husband.

LORD MERRIMAN, P. : This is a wife's appeal from the dismissal on July 3, 1952, by justices for the city of Coventry, of her summons on the ground of persistent cruelty. That summons is dated May 27, 1952, but there had been an earlier summons, which was issued on Jan. 5, 1952, and came to trial on Jan. 31, before a court in the same petty sessional division. This earlier summons also alleged persistent cruelty. It was dismissed, and the point in this appeal is whether, on July 3, the justices were entitled to refuse to hear evidence of any alleged ill treatment by the husband of the wife antecedent to the dismissal of her first summons.

[His LORDSHIP stated the facts and continued:] The question is whether the justices have so seriously misdirected themselves and so improperly rejected evidence that it is impossible for us to uphold the decision, in spite of the improper rejection of evidence, on the ground that no substantial miscarriage of justice has occurred. I think that this is a very serious misdirection, which goes to the root of the case. The same sort of point has been before the Divisional Court

more than once in recent years, and our attention has been drawn to *Molesworth v. Molesworth* (1). That case related to an alleged estoppel in connection with a charge of wilful neglect to maintain by the withdrawal of that charge in favour of a summons for desertion. If I may quote from my own judgment, with reference to a decision of SIR SAMUEL EVANS, P., in *Stokes v. Stokes* (2), in which he had laid down the principle that a cause of complaint which had been adversely determined against the complainant could not be raised again by her in a court of summary jurisdiction, and to his statement that the fact that desertion is a continuing offence made no difference because desertion must be referable to some particular time when it began, I said that, if it was sought to apply that passage to all possible cases of desertion it would go too far, and I am reported as having said:

"It makes all the difference in the world in certain circumstances for precisely the same reason that in a charge of persistent cruelty the conduct which is alleged, within the period of the summons which is being dealt with, to amount to persistent cruelty can only be judged in the light of the whole course of conduct, and the mere fact that at an earlier stage, when the conduct was only partly completed, a court has adjudged that at that point it does not amount to persistent cruelty, does not shut that evidence out for ever, any more than it does in certain cases of desertion."

It is truly said that that reference to a charge of persistent cruelty was obiter dictum in the case with which we were then dealing, but our attention has been called to an unreported case, *Jones v. Jones* (3), heard on Oct. 25, 1951, by this court [LORD MERRIMAN, P., and COLLINGWOOD, J.], which appears to me to raise substantially the point which we are now asked to decide. That was a case of constructive desertion. In November, 1950, the wife had taken out a summons, which was dismissed, and when the matter came before the same justices on another summons in September, 1951, they refused to go into the history antecedent to the dismissal of the summons in November, 1950. In the present case counsel for the wife submitted that he was entitled to call the evidence of incidents prior to Jan. 31, 1952, but the bench held there was not sufficient evidence of cruelty "to allow the revival of previous evidence of matters which had become *res judicata*". The same sort of phraseology was used in *Jones v. Jones* (3), and in my judgment I said:

"The justices do not say that they do not believe the wife. If they had said that, of course, there would have been no more to argue about. But they begin by saying that a complaint by the wife had been inquired into on a summons heard in November, 1950, and dismissed. As a matter of history that is true. They then go on to say that nothing of a substantial character or of any gravity had taken place which would revive what had gone before to justify the wife leaving her husband again in February, 1951."

That differentiated the case from *Stokes v. Stokes* (2). We were dealing, not with the same period and the same separation, but with a different separation. I continued:

"It is clear that the use of the word 'revive' is wrong in that context, but I do not want to make too much of that by itself. I think the plain explanation of it is what COLLINGWOOD, J., suggested in the course of the argument, namely, that there was nothing which had occurred since her

(1) 112 J.P. 65; [1947] 2 All E.R. 842.

(2) 75 J.P. 502; [1911] P. 195.

(3) (Oct. 25, 1951), unreported.

return in December to justify the justices in considering what had happened before the dismissal of the summons in November. Now, that must be wrong. Equally, of course, it is wrong to talk about 'revival' as if some offence had been committed and condoned and there was the question whether there was enough to revive it. If there had been an offence, for example, if cruelty had been established up to November, the use of the word 'revive' would have been right, because she had condoned it by coming back. But it was not. It is not a case of reviving an offence which had been committed, because they found none had been committed at the time. If, on the other hand, what they are saying is: 'What happened afterwards was not enough to justify us in considering anything else', then, in my opinion, they are plainly wrong. And that is what I think they have said. Unless the case in November was disposed of on the footing that the wife was not telling the truth at all and they did not believe a word of what she said, of which there is no suggestion, this is plainly a case in which the whole history, including, no doubt, the dismissal of the summons, is relevant up to the moment of the last hearing. To put it another way, the mere fact that in November, 1950, the court thinks that there has not been a sufficient accumulation of facts to justify the wife in withdrawing from cohabitation, and that she has, so to speak, struck too soon, does not disentitle her to bring those facts into consideration three months later and say: 'Now look what has happened in the meantime. It is impossible to say I have struck too soon now'."

Although *Molesworth v. Molesworth* (1) was not cited to us, so far as I can see, looking at my note of that appeal, that is exactly the same reasoning as actuated me when I said in that case:

"... in a charge of persistent cruelty the conduct which is alleged, within the period of the summons which is being dealt with, to amount to persistent cruelty can only be judged in the light of the whole course of conduct, and the mere fact that at an earlier stage, when the conduct was only partly completed, a court has adjudged that at that point it does not amount to persistent cruelty, does not shut that evidence out for ever..."

In my opinion, we have no option in the present case but to send the matter back to the justices to hear the wife's case. It is impossible for us to judge whether, on the course of conduct as a whole, a charge of persistent cruelty has or has not been made out. That must be determined by the court of summary jurisdiction on evidence of the whole course of conduct which is alleged to constitute the persistent cruelty.

DAVIES, J.: I agree.

*Appeal allowed.*

Solicitors: *Thompson, Quarrell & Megaw*, agents for *Blythe, Owen George & Co.*, Coventry (for the wife); *Sharpe, Pritchard & Co.*, agents for *S. G. Ansell & Co.*, Coventry (for the husband).

G.F.L.B.

(1) 112 J.P. 65; [1947] 2 All E.R. 842.



COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., PARKER AND HAVERS, JJ.)

Oct. 27, 1952

REG. v. CRABTREE

*Criminal Law—Evidence—Antecedents of prisoner—Reference to associates of prisoner—Duty of police to communicate details to defence before trial.*

Observations on the propriety of a police officer who is giving evidence of the antecedents of a prisoner after conviction referring to the associates of the prisoner, and on the duty of the police to communicate details of the antecedents to the defence before trial.

APPEAL against sentence.

The appellant was convicted at Preston Quarter Sessions on two charges of receiving stolen lead and was sentenced to nine years' imprisonment. Before sentence, evidence was given by a police officer of the appellant's history. The evidence was given in the form prescribed by Home Office Circular No. 188/1950, dated Sept. 14, 1950, the police officer stating, *inter alia*, that, in his opinion, the appellant was a member of a gang of thieves and safebreakers. Counsel representing the appellant at the trial was unaware that this evidence was going to be given and he allowed it to go unchallenged.

*Dorothy Dix* for the appellant.

**LORD GODDARD, C.J. :** Questions have been raised as to the propriety of certain evidence which was given by the police after conviction, and also as to the Home Office circular which has been issued for the guidance of chief constables and police officers generally with regard to giving evidence as to previous history and character.

The circular starts by suggesting the type of evidence that the officer should be prepared to give, and then goes on to say:

"It appears that as a rule the courts are willing to receive information about the offender's general reputation and associates, if this is relevant to the offence of which he has been convicted, but every care should be taken to ensure that this opinion is based on a reasonable foundation of fact. As a general rule this information should not appear on the officer's proof and should not be volunteered unless the question is asked or allowed by the court. The officer giving evidence should be in possession of any further information that the police may have about the offender in order that he may supplement his evidence if necessary."

That is an accurate and proper description of the situation. This court has said that courts may properly receive evidence with regard to the prisoner's general associates, so long as the officer tendering the evidence is speaking of matters which are within his knowledge, and is speaking to facts and not merely to stories he may have heard. The circular continues:

"Applications are occasionally received from solicitors acting for the defence that the police should before trial disclose details of their clients' previous convictions and past records generally; and the question whether this information should be disclosed has been raised from time to time. Although this is a matter in which chief officers of police must exercise their discretion, the Secretary of State is of opinion that details of previous



convictions should not be given to defending solicitors before trial unless the chief officer of police is satisfied that the solicitor has his client's authority for requesting this information."

Generally, the solicitor would be well advised to find out from his client before the trial whether his client has a criminal record, because otherwise counsel may be instructed in such a way that he may unwittingly let in evidence of his client's convictions. It is, therefore, desirable that the solicitor should know if the client for whom he is appearing has previous convictions, but no objection can be taken to the warning given by the Secretary of State that the police officer should be sure that the solicitor has his client's authority for requesting information.

There is, however, one paragraph in the circular of which the court does not approve:

"As regards details of antecedent history other than convictions the Secretary of State suggests that there is no reason why this should be given."

We think that if the officer is going to say, if asked, although it is not to be contained in the proof he puts before the court, that the prisoner has a bad character through being known as an associate of thieves and so forth, that ought to be communicated to counsel for the defence who may wish to take his client's instructions whether the evidence which the police officer is going to give is disputed or not. In the present case if the appellant had instructed his counsel to dispute this evidence, counsel could, though it would have been an unwise thing to do, have cross-examined the police officer. The officer would then, no doubt, mention the persons with whom the appellant was associating and what their history was at the time he was associating with them. However, we shall suggest to the Secretary of State that the circular should be altered in some particulars with regard to evidence before sentence.

*Sentence reduced.*

Solicitor : *Registrar of Court of Criminal Appeal* (for the appellant).

T.R.F.B.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., and DAVIES, J.)

Oct. 28, 29, 1952.

KENDALL v. KENDALL

*Husband and Wife—Maintenance order—Persistent cruelty—Subsequent inconsistent finding of High Court on same facts—Right of husband to discharge of order.*

On Sept. 13, 1944, the wife obtained an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the ground of the husband's persistent cruelty. On Aug. 2, 1951, she filed a petition for divorce, setting out substantially the same allegations of cruelty. On Mar. 24, 1952, this petition was dismissed by a divorce commissioner who found that the allegations of cruelty were not proved. On a summons by the husband to discharge the order of Sept. 13, 1944.

HELD: the finding of the High Court on the same facts as those on which the order of the justices was based was conclusive, and, therefore, the order of the justices could not stand and must be discharged.

*Pratt v. Pratt* (1927) (96 L.J.P. 123), applied.

APPEAL by the husband against the dismissal on May 21, 1952, by the justices for the petty sessional division of Bulmer West in the North Riding of Yorkshire, sitting at Easingwold, of his application to discharge an order made in favour of the wife by the justices on Sept. 13, 1944, on the ground that the husband had been guilty of persistent cruelty to her.

*Parris* for the husband.

The wife did not appear.

LORD MERRIMAN, P., in the course of his judgment, said: We have looked at the notes of the evidence taken at the original hearing in 1944. It is quite clear from those notes, as we now know the wife herself admitted, that the cruelty then alleged coincided item by item, so far as was possible, with the cruelty alleged by her in her petition for divorce on the ground of cruelty, which was dated Aug. 2, 1951. I say "so far as was possible", because the last two paragraphs of her petition contained allegations of incidents which occurred after the original hearing and so could not have then been brought before the justices. In every other respect the charges are identical. On Mar. 24, 1952, the petition came before His Honour JUDGE STEWART, sitting as a commissioner in divorce at York, and was dismissed on the merits, the learned judge finding that the charges of cruelty in the petition were not proved. Thereupon the husband took out this summons, putting forward, as he was fully entitled to do, the dismissal of these identical charges as fresh evidence.

Counsel for the husband read the notes of the proceedings on this summons, and, on instructions, told us that the matter had been put before the justices by the solicitor on behalf of the husband as a case for the discharge of the original order on the ground that the same matters had been adjudicated on later by the High Court and the whole basis on which the order had been made had been destroyed by the subsequent finding. The solicitor cited to the justices *Pratt v. Pratt* (1). I will read one passage in the judgment of LORD MERRIVALE, P., in that case, which was a little more complicated than the present case, because it related to the revivor of an order in favour of a wife which had already been discharged by the justices on the ground that she

(1) (1927), 96 L.J.P. 123; 137 L.T. 491.

had committed adultery, whereas on a subsequent trial in the High Court it had been held that she had not, but in substance the point is the same. LORD MERRIVALE, P., said (96 L.J.P. 124):

"The husband, having obtained the discharge of the order, filed a petition in this court for dissolution of his marriage . . . on the ground of adultery, alleging the adultery which had been found in point of fact by the justices . . . The decision of the justices was effective for the purpose for which it was applied, but it had not concluded the matter. The difference as between that decision and the decision of the learned judge who heard the petition for divorce was that he could make a conclusive finding, and the learned judge, after hearing the evidence tendered by the husband, came to the conclusion that the wife had not committed the alleged adultery, and he so found."

Everything there applies *mutatis mutandis* to the present case.

The astonishing thing is that from first to last on the notes of the proceedings on the husband's application there is not a hint that this was the issue in the case or that this point was taken. There is no reference to it in the finding, and all that happened was that the justices took on themselves to reduce the wife's order from £1 to 10s., which nobody had suggested should be done. Before parting with the case I wish to call the attention of the justices and their clerks to *Sullivan v. Sullivan* (1) and to what was said recently in this court in *Ormsby v. Ormsby* (2).

DAVIES, J., agreed.

*Appeal allowed.*

Solicitors: *Kenneth Brown, Baker, Baker*, agents for *H. E. Harrowell, Brown & Bloor*, York (for the husband).

G.F.L.B.

(1) 111 J.P. 27; [1947] P. 50.

(2) *ante*, p. 1.

## COURT OF APPEAL

(SOMERVELL, JENKINS AND HODSON, L.JJ.)

October 6, 7, November 3, 1952

*Re K* (an infant). ROGERS AND ANOTHER *v.* KUZMICZ

*Adoption—Dispensing with consent to order—Consent . . . unreasonably withheld—Adoption conducing to child's welfare—Child having been placed in care of foster-parents—Consent originally given, but later withdrawn—Adoption Act, 1950* (14 Geo. 6, c. 26), s. 3 (1) (c).

*Adoption—Guardian ad litem—Infant parent—County Court Rules, 1936, Ord. 5, r. 13, r. 14—Adoption of Children (County Court) Rules, 1949 (S.I., 1949, No. 2396), r. 1, r. 9.*

The mother of an infant left her husband, the father of the infant, three weeks after the infant was born, and went to live with her parents. Later, she obtained an order of justices giving her the custody of the infant and directing the father to pay 5s. a week for its maintenance. The mother, wishing to go out to work, on the advice of the children's officer of the local authority, placed the infant in the care of foster-parents who received the 15s. from the father and a further 5s. a week from the mother who visited the infant from time to time. After about

a year the mother began to live with a married man, intending, if and when it became possible, to marry him. The foster-parents approached the mother with a view to adopting the infant, and on Mar. 1, 1952, the mother consented in writing to the adoption, but on Apr. 28, 1952, she withdrew her consent. On an application by the foster-parents to the county court for an adoption order in respect of the infant, the county court judge held that in the circumstances the mother's consent had been unreasonably withheld within the meaning of s. 3 (1) (c) of the Adoption Act, 1950, and he made an interim order in favour of the applicants. At the date of the hearing of the application the mother was under twenty-one.

**HELD:** the withholding by a parent of consent to an adoption could only properly be held to be unreasonable in exceptional cases; in determining in the present case whether the mother's consent to the order was unreasonably withheld within the meaning of s. 3 (1) (c) the facts that the order, if made, would conduce to the welfare of the child, that the mother had seen fit to place the infant in the care of foster-parents (without in any way abandoning it), and that she had previously consented to the adoption were not evidence that her consent was unreasonably withheld, and, therefore, the county court judge had misdirected himself and his decision was wrong.

*Hitchcock v. W.B.* (1952) (116 J.P. 401), approved.

**Per curiam:** Under the Adoption of Children (County Court) Rules, 1949, rr. 1 and 9, read in conjunction with the County Court Rules, 1936, Ord. 5, rr. 13 and 14, it would seem that a guardian ad litem of an infant parent who is respondent in adoption proceedings ought to be appointed on its appearing on the face of or in the course of the proceeding that he or she is an infant. In the ordinary case where all that is necessary is that the judge should be satisfied of the parent's consent, no useful purpose would be served by the appointment of a guardian ad litem, but, where an infant parent opposes and an order is sought against the parent's will on the ground that his or her consent is unreasonably withheld, the question whether a guardian ad litem should be appointed is one in which the position should be made clear in the rules.

**APPEAL** by the respondent from an interim order under s. 6 (1) of the Adoption Act, 1950, made by His Honour JUDGE WILLES at Derby and Long Eaton County Court on May 29, 1952, on an application for an adoption order authorising the applicants to adopt the respondent's infant. The county court judge held that the respondent's consent to the adoption was unreasonably withheld, within the meaning of s. 3 (1) (c) of the Act of 1950.

*Maude, Q.C.*, and *Gwynedd Lewis* for the respondent mother.

*Carter, Q.C.*, and *Bush* for the applicants.

*Harold Lightman* for the Derby Education Committee as guardian ad litem of the infant.

*Cur. adv. vult.*

Nov. 3. **JENKINS, L.J.**, read the following judgment of the court. This is an appeal by Mrs. Eva Florence Kuzmicz, the mother of a male infant born on Mar. 26, 1950, and, therefore, now a little over two and a half years old, from an interim order under s. 6 (1) of the Adoption Act, 1950, made by His Honour JUDGE WILLES in the Derby and Long Eaton County Court, and dated May 29, 1952, on an application under the Act by Mr. and Mrs. Rogers, for an adoption order authorising them to adopt the infant. The mother on Mar. 1, 1952, duly signed before a justice of the peace the prescribed statutory form of consent to the proposed adoption, but she withdrew such consent on Apr. 28, 1952, and was represented at the hearing by a solicitor (Miss Booth) who opposed the application on her behalf. For the reasons stated in his careful reserved judgment, which appears to have been delivered on June 14, 1952, the learned judge, nevertheless, held that in the circumstances of the case an adoption order could and should be made without the mother's consent, inasmuch as he was satisfied that her consent was unreasonably withheld within the meaning of the Act, and, accordingly, ought, in the exercise of his discretion, to dispense with such consent, the case being in all other respects a proper one

for such order. The order actually made was, as mentioned above, not a full adoption order, but an interim order under s. 6 (1) of the Act, and its effect was merely to give the custody of the infant to the applicants for a probationary period of three months. As may be seen from his judgment, the learned judge made his order in this limited form in deference to the possibility, or probability, of the present appeal, and not on account of any doubt as to the suitability of the proposed adopters. That being so, and having regard to the terms of s. 6 (2) of the Act, the considerations bearing on the result of this appeal would seem to be precisely the same as they would have been if the order under appeal had been a full adoption order.

The appeal raises, in effect, two questions, the second of which need, strictly speaking, only be determined if the learned judge is held to have been right on the first. The two questions are: (i) Whether, having regard to the relevant provisions of the Act of 1950, the facts found by the learned judge afforded any evidence capable in law of satisfying him that the mother's consent was unreasonably withheld, so as to empower him, if so satisfied, to dispense with such consent in the exercise of his discretion; (ii) if so, whether the proceedings before the learned judge were defective owing to the circumstance that the mother, who was born on Aug. 5, 1931, and thus throughout those proceedings was herself an infant, was not provided with a guardian ad litem?

Before going further into the facts, we may conveniently refer to some of the provisions of the Act of 1950. Section 1 provides:

"(1) Subject to the provisions of this Act, the court may, upon an application made in the prescribed manner by a person domiciled in England or Scotland, make an order (in this Act referred to as an adoption order) authorising the applicant to adopt an infant. (2) An adoption order may be made on the application of two spouses authorising them jointly to adopt an infant."

Section 2 provides:

"(4) Subject to the provisions of s. 3 of this Act, an adoption order shall not be made—(a) in any case, except with the consent of every person or body who is a parent or guardian of the infant or who is liable by virtue of any order or agreement to contribute to the maintenance of the infant; (b) on the application of one of two spouses, except with the consent of the other spouse . . . (6) An adoption order shall not be made in respect of any infant unless—(a) the infant has been continuously in the care and possession of the applicant for at least three consecutive months immediately preceding the date of the order . . ."

Section 3 provides:

"(1) The court may dispense with any consent required by s. 2 (4) (a) of this Act if it is satisfied—(a) in the case of a parent or guardian of the infant, that he has abandoned, neglected or persistently ill-treated the infant; (b) in the case of a person liable by virtue of an order or agreement to contribute to the maintenance of the infant, that he has persistently neglected or refused so to contribute; (c) in any case, that the person whose consent is required cannot be found or is incapable of giving his consent or that his consent is unreasonably withheld . . . (3) The consent of any person to the making of an adoption order in pursuance of an application (not being the consent of the infant) may be given (either unconditionally or subject to conditions with respect to the religious persuasion in which



the infant is to be brought up) without knowing the identity of the applicant for the order; and where consent so given by any person is subsequently withdrawn on the ground only that he does not know the identity of the applicant, his consent shall be deemed for the purposes of this section to be unreasonably withheld. (4) While an application for an adoption order in respect of an infant is pending in any court, any parent or guardian of the infant who has signified his consent to the making of an adoption order in pursuance of the application shall not be entitled, except with the leave of the court, to remove the infant from the care and possession of the applicant; and in considering whether to grant or refuse such leave the court shall have regard to the welfare of the infant."

Section 4 provides:

"(1) Where any person whose consent to the making of an adoption order is required by s. 2 (4) (a) of this Act does not attend in the proceedings for the purpose of giving it, then, subject to the provisions of sub-s. (3) of this section, a document signifying his consent to the making of such an order shall, if the person in whose favour the order is to be made is named in the document or (where the identity of that person is not known to the consenting party) is distinguished therein in the prescribed manner, be admissible as evidence of that consent, whether the document is executed before or after the commencement of the proceedings. (2) Where any such document is attested by a justice of the peace (or, if executed outside the United Kingdom, by a person of any such class as may be prescribed), the document shall be admissible as aforesaid without further proof of the signature of the person by whom it is executed; and for the purposes of this sub-section, a document purporting to be attested as aforesaid shall be deemed to be so attested, and to be executed and attested on the date and at the place specified therein, unless the contrary is proved. (3) A document signifying the consent of the mother of an infant shall not be admissible under this section unless—(a) the infant is at least six weeks old on the date of the execution of the document; and (b) the document is attested on that date by a justice of the peace or, as the case may be, by a person of a class prescribed for the purposes of sub-s. (2) of this section."

Section 5 (1) provides:

"The court before making an adoption order shall be satisfied—(a) that every person whose consent is necessary under this Act, and whose consent is not dispensed with, has consented to and understands the nature and effect of the adoption order for which application is made, and in particular in the case of any parent understands that the effect of the adoption order will be permanently to deprive him or her of his or her parental rights; (b) that the order if made will be for the welfare of the infant, due consideration being for this purpose given to the wishes of the infant, having regard to the age and understanding of the infant . . ."

Section 6 provides:

"(1) Subject to the provisions of this section, the court may, upon any application for an adoption order, postpone the determination of the application and make an interim order giving the custody of the infant to the applicant for a period not exceeding two years by way of a probationary period upon such terms as regards provision for the maintenance and education and supervision of the welfare of the infant and otherwise

as the court may think fit. (2) All such consents as are required to an adoption order shall be necessary to an interim order but subject to a like power on the part of the court to dispense with any such consent. (3) An interim order shall not be made in any case where the making of an adoption order would be unlawful by virtue of s. 2 (6) of this Act. (4) An interim order shall not be deemed to be an adoption order within the meaning of this Act."

Section 10 (1) provides:

"Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and (in England) to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid (and, in Scotland, in respect of the liability of a child to maintain his parents) the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock."

The facts on which the learned judge's decision was based will be best appreciated by reading at length from his considered judgment his own narrative of the facts as found by him, which is as follows:

"On Oct. 29, 1949, Mrs. Kuzmicz (Eva Florence Fewkes) an English girl, whose parents live in Derby, married her husband, Mikolaj Kuzmicz, a Pole resident and working in Derby. At the date of this marriage, and, perhaps, explaining it, the wife was pregnant. Her child, Andre, the subject of this petition, was born on Mar. 26, 1950. He was just over two years of age when I heard the petition. A healthy, happy, and, for his age, very intelligent, baby, quite willing to play with people whom he knew, well able to distinguish and be distrustful or shy in the presence of strangers. Three weeks after the child was born, as she said in consequence of his attitude towards and treatment of her, Mrs. Kuzmicz left her husband. This misfortune, and its cause, resulted in a finding by the Mansfield justices that the mother was entitled to the custody of the child and the father liable to pay the sum of 15s. a week for its maintenance. The husband and wife (who had then been married for less than a year) seemed to have been temporarily reconciled because a second order to the same effect was made on the wife's application by the Derby justices on Nov. 7, 1950. When the mother was living with her parents, and because, though her baby was only a few months old, she wanted or had to go out to work, she approached Miss Kirk, the excellent and experienced children's officer for the borough of Derby. Though adoption may have been mentioned, at this time Miss Kirk, having regard to the mother's background and matrimonial history, considered that the proper and most helpful course to adopt was to get the child into the care of suitable and trustworthy foster-parents in the hope and belief that in the near future the recently married parties would become reconciled and the mother re-take and care for the child. Accordingly, Mrs. Kuzmicz was introduced by Miss Kirk to the present applicants, Mr. and Mrs. Rogers. Mr. Rogers is, I think, permanently employed in the office of the local housing authority. He and his wife were married in 1937. They have

one child a girl, now thirteen years of age, but, to their mutual disappointment and especially to that of the adopting father, they have no son. Miss Kirk introduced them to Mrs. Kuzmicz because she had on other occasions invoked and obtained their temporary help as foster-parents in similar cases. As the result of a discussion with this baby's parents Mr. and Mrs. Rogers, who would not contemplate adopting the child, partly for financial reasons, but much more for the reason that the parents were hoped and expected to become reconciled, agreed to take Andre (five and a half months old) into their household and to care and provide for him, the father paying them 15s. a week to which the mother added from her own earnings a further sum of 5s. a week, making the total contribution £1. So matters continued for about a year. The mother called from time to time and saw her baby at intervals of about three weeks or less. I think these occasions were probably when she brought the money for his maintenance. She did not take the child out. It remained, and has always remained, in its home regarding and treating the Rogers as its parents. About August or September, 1951, Mrs. Kuzmicz commenced an association (which she described to me as 'courting') with another Pole, a married man, who was, I think, separated from his wife. I do not think that Mrs. Kuzmicz intended or wished to disguise or deny the real nature of this association. She frankly admitted that since last January she has lived as man and wife (I think in rooms) with this married Pole. She hopes to divorce or be divorced by her husband, and that the Pole she lives with will divorce or be divorced by his wife, and that, when these matrimonial re-adjustments have been duly effected, she will marry the Pole with whom she is now living. On Mar. 1, 1952, before a justice of the peace and in full compliance with all the relevant safeguards, Mrs. Kuzmicz signed her consent to the adoption. She told me that the magistrate had told her that her consent so given could be withdrawn. The form itself indicates this in a reference to the use that may be made of the document. I am quite satisfied that she fully understood the consequences of an adoption order and that her consent to such consequences was required, and that with such knowledge she gave such consent, but I do not think it would be right or just to hold that, in doing so, she was not influenced by the knowledge she had or information she was given to the effect that her signed consent could be withdrawn before the hearing of the petition. Though I discussed the matter with Miss Booth, it was not suggested, nor could be suggested, that Mrs. Kuzmicz's signed consent was the result of pressure or undue influence by any person interested in obtaining it. I think the truth of what happened is this. After the child had been for over a year in the care of the Rogers it had got to love them and treat them as its parents and they had become very attached to the child. The position of the mother made it certain that reconciliation with her husband was impossible. Mrs. Rogers approached Mrs. Kuzmicz and discussed adoption, pointing out that the development and existing attitude of the child and the mother's then matrimonial position made it necessary in the interests of the child and of everybody concerned to consider and decide the question of its adoption. Mrs. Kuzmicz, no doubt, was in a difficulty in the sense that she could not re-take the child, but I think her decision to consent to its adoption was her free judgment of her child's interests. After she had signed the formal consent she tells me she had begun to have misgivings, and for that reason consulted her own father who told

her that he thought her decision was right. She did not withdraw her consent to the adoption until she had consulted her solicitor, Miss Booth, who wrote to that effect on Apr. 28, 1952. The father, who, so far as I know, has taken no interest in the child since its birth, attended the hearing to support the petition, having given his formal written consent to the proposed adoption. No doubt, his attitude is not uninfluenced by the fact that an adoption order when made will relieve him of his liability to pay 15s. a week for the child's maintenance."

Earlier in his judgment, the learned judge discusses at length the effect, in relation to the parent of an infant, of the provision in s. 3 (1) (c) of the Act, under which the court may dispense with any consent required by s. 2 (4) (a) if satisfied "in any case" that the consent of the person whose consent is required "is unreasonably withheld". He refers to *Re Hollyman* (1) where the Court of Appeal held in a case under the Adoption of Children Act, 1926, that a parent's written consent to an adoption could be withdrawn at any time before the adoption order was actually made. He also refers to *Harris v. Hawkins* (2) where a King's Bench Divisional Court held that the general provision in s. 2 (3) of the Adoption of Children Act, 1926, enabling the court to dispense with the consent of any person "whose consent ought, in the opinion of the court and in all the circumstances of the case, to be dispensed with" extended to dispensing with the consent of a parent in a proper case, and, in effect, holds (as is clearly right) that the corresponding provision in s. 3 (1) (c) of the Act of 1950, notwithstanding its different language, has not altered the law in this respect. He expresses his view of the intention of s. 3 (1) (c) in these terms:

"I think the proviso in its present form was regarded [by the legislature] as creating and conferring on the court a judicial discretion to dispense with a consent otherwise required, in any case in which such consent was unreasonably withheld by the person withholding it, having regard to the welfare of the child, the subject of the adoption, and whose wishes the court is required to consider by the express terms of [s. 5] in which the duties and functions of the court are prescribed."

A little later in his preliminary discussion he amplifies this statement of the intention of s. 3 (1) (c) by the following definition of his duty under that provision:

"I am quite satisfied that in the discharge of my duty, and in the exercise of my discretion to dispense with the consent of a parent whose required consent to an adoption is withheld, I have to decide the question whether such consent is or is not unreasonably withheld in the light of the circumstances in which the adoption was applied for and the consent withheld, having regard to the interests and welfare and also (in a case where this is possible) to the wishes of the child whose adoption and whose future life hangs in the balance."

He then proceeds to discuss the circumstances in which the court could properly interfere with parental rights by making an adoption order against the will of the parent, and draws a distinction between cases in which the objecting parent "has got the child in her care and custody" and cases in which such care and custody is in other hands. Regarding cases of the latter class, he says this:

"I do not think the power to dictate the future or welfare of a child

(1) 109 J.P. 95; [1945] 1 All E.R. 290.

(2) 111 J.P. 160; [1947] 1 All E.R. 312; sub nom. *H. v. H.*, [1947] K.B. 463.



not in the actual possession of the parent, but which has from a very early age been entrusted by her to the loving care of foster-parents whom the child has learnt to love and treat as its father and mother, is uncontrollable in the sense that such a parent can withhold her consent to the adoption of her child by withdrawing a consent previously given in accordance with all the prescribed safeguards, whatever view the court may take of the welfare of the child whose adoption is in question."

He draws a further distinction between cases in which consent has been consistently refused by a parent from first to last and cases in which consent has been given, but later withdrawn. With regard to this distinction he says:

"In my view, though such a decision [i.e., to dispense with an objecting parent's consent] would obviously be a grave decision requiring exceptional justification, it is not legally impossible for the court to dispense with the consent required from a party, not falling within any of the above categories, who has always refused to give such consent. Be this as it may, and though all of these cases are necessarily serious questions for a court exercising discretionary powers, it is a different matter when the consent which the court is asked to dispense with has been given by a mother who afterwards withholds it in the exercise of the right judicially established by the Court of Appeal in 1945 in *Re Hollyman* (1)."

He then proceeds to state his findings of fact in the passage already quoted at length, and continues:

"In the light of these facts, as I understand the Adoption Act, 1950, it is my duty, treating the withdrawal of the mother's consent previously given as a withholding of such consent, to decide whether such consent is unreasonably withheld, having regard to the question whether the order, if made, would be for the benefit of the child."

Finally, the learned judge discusses the question of the infant's welfare, with particular reference to the fact that the infant had a settled home with Mr. and Mrs. Rogers whom he had come to regard as his parents, and of whose suitability as adoptive parents the learned judge had clearly formed a most favourable impression, and reaches the conclusion that an adoption order ought to be made in favour of Mr. and Mrs. Rogers, but (as already mentioned) confines himself for the time being to the making of an interim order only, in view of the possibility or probability of the present appeal. We should add that the learned judge, on the analogy of *Allen v. Allen* (2) and *Willoughby v. Willoughby* (3), decisions concerning the custody of children (with respect to which the welfare of the infant is, under s. 1 of the Guardianship of Infants Act, 1925, the first and paramount consideration) held, in effect, that, inasmuch as those cases showed that comparable circumstances were no ground for holding that it would be contrary to the infant's welfare to allow a mother the custody of her child, he ought in arriving at his decision in the present case to disregard the irregular association formed by the mother with another man since parting with her husband. We agree with the learned judge that this matter should for the present purpose be disregarded, not, however, on account of the analogy drawn from custody cases, which we think misleading, but simply because this matter does not in itself have any bearing on the question whether the mother's consent to the adoption was or was not unreasonably withheld.

(1) 109 J.P. 95; [1945] 1 All E.R. 290.

(2) 112 J.P. 355; [1948] 2 All E.R. 413.

(3) [1951] P. 184.



We may now return to the first question in the appeal, that is to say, whether, having regard to the relevant provisions of the Act of 1950, the facts as found by the learned judge afforded any evidence capable in law of satisfying him that the mother's consent was unreasonably withheld. In our opinion, this question should be answered in the negative. In our view, the learned judge misdirected himself and proceeded on wrong principles in holding that the case was one in which he could, and should in the exercise of his discretion, dispense with the mother's consent on that ground.

It is to be observed, first, that, as a general rule, the consent of the persons mentioned in s. 2 (4) (a) of the Act, and, in particular, of any parent of the infant, is indispensably necessary to the making of an adoption order under the Act. It is to be observed, secondly, that s. 3 (1), in conferring power to dispense with such consent, enables this to be done in certain specific cases, including the case of a parent if the court is satisfied that he has abandoned, neglected or persistently ill-treated the infant, and concludes (in para. (c)) with a general provision enabling consent to be dispensed with in any case if the court is satisfied, *inter alia*, that it is unreasonably withheld. It is to be observed, thirdly, that under s. 10 (1) of the Act the effect of an adoption order, put shortly, is to extinguish all the rights, duties, obligations and liabilities of the parent in regard to the infant, to vest those rights, duties, obligations and liabilities in the adopter, and to convert the infant into the legal equivalent of a child born to the adopter in lawful wedlock, to whom the natural parent becomes in the eye of the law a mere stranger.

It is, no doubt, true that s. 3 (1) (c) extends to the case of a parent and gives the court jurisdiction to dispense with the consent even of a parent who has not been guilty of any such misconduct or dereliction of duty towards the infant as is mentioned in s. 3 (1) (a), if satisfied that such parent's consent is unreasonably withheld. But we ask ourselves in what circumstances is a parent, not guilty of any such misconduct or dereliction of duty, to be held to have acted unreasonably in withholding his or her consent to an order the effect of which, if made, will be to extinguish once and for all his or her parental rights, duties and obligations in regard to the infant, and, indeed, the very relationship between them of parent and child, and to make the infant thenceforth the child of the adopters in substitution for, and to the utter exclusion of, its natural parents? *Prima facie* it would seem to me eminently reasonable for any parent to withhold his or her consent to an order thus completely and irrevocably destroying the parental relationship. One can imagine cases short of such misconduct or dereliction of duty as is mentioned in s. 3 (1) (a) in which a parent's withholding of consent to an adoption might properly be held to be unreasonable, but such cases must, in our view, be exceptional. It is unnecessary, undesirable and, indeed, impracticable to attempt a definition covering all possible cases of that kind. Each case must depend on its own facts and circumstances. But it is, at all events, possible to specify certain facts and circumstances which plainly cannot suffice to make a parent's withholding of consent unreasonable.

Pursuing this negative course and relating it to the facts and circumstances of the present case, we would say, first, that the withholding of a parent's consent to an adoption order cannot be held unreasonable merely because the order, if made, would conduce to the welfare of the child. Otherwise a parent in poor circumstances, but guilty of no misconduct or dereliction of duty towards his child, could be compelled against his will to submit to an adoption order being made in respect of that child in favour of any adopters who by

reason of more affluent circumstances could make better provision for the child than he could ever hope to do.

Secondly, we would say that such withholding of a parent's consent cannot be held unreasonable merely because the parent has, in circumstances such as those of the present case, placed the child in the care of foster-parents, without in any sense abandoning it, but on the contrary contributing towards its support and visiting it from time to time. Otherwise the remarkable consequence would ensue that foster-parents entrusted for reward with the care of a child by a parent not for the time being able to provide it with a suitable home could in due course confront the parent with an application to adopt the child which the parent would be unable to oppose. We confess we do not appreciate the learned judge's reasoning on this aspect of the case. The mother, separated from her husband, found it necessary or desirable to go out to work, and, on the advice of the local children's officer, placed the child in the care of the applicants as "suitable and trustworthy foster-parents", visiting the child at intervals of three weeks or less and contributing the weekly sum of £1 consisting of 15s. payable by her husband under the justices' order and 5s. added by herself. We wholly fail to see why this arrangement, continued though it was for a matter of two years, should make it unreasonable for the mother to withhold her consent to the adoption of the child by those same foster-parents. No doubt, the child was settled and happy with them, and his removal might cause him temporary unhappiness. But that, so far as we can see, has no bearing whatever on the question whether the mother's withholding of consent to the adoption was or was not unreasonable. To treat it as relevant to that question, in our view, is to confound adoption with custody. If custody was in question, the fact that the child had a settled home with the foster-parents would, no doubt, be a consideration in favour of leaving him with them, but, even so, it would in itself hardly outweigh the countervailing consideration that the best place for a young child is ordinarily with its mother. Be that as it may, the question here is not of custody but of adoption, which is an entirely different matter. In this connection we would refer to s. 2 (6) (a) of the Act, which prohibits the making of an adoption order unless the infant has been in the care and custody of the applicant for at least three consecutive months immediately preceding the date of the order. That provision seems to us to be wholly inconsistent with the view that a parent's consent can be regarded as unreasonably withheld merely because the care of the infant has been in other hands for a substantial period.

We would say, thirdly, that the withholding of a parent's consent to an adoption order cannot be held unreasonable merely because a documentary consent under s. 4 (1) of the Act has been given by the parent and subsequently withdrawn. It should be noted that s. 4 (1) only provides that the document is to be admissible evidence of the consent if the person concerned does not attend in the proceedings for the purpose of giving it. There is no suggestion that the document is to be conclusive evidence, still less that once given it cannot be withdrawn. We think the decision in *Re Hollyman* (1) to the effect that a parent's written consent to an adoption under the Adoption of Children Act, 1926, could be withdrawn at any time before the actual making of the order is no less applicable to the Act of 1950. The possibility of a consent once given being subsequently withdrawn is, indeed, recognised in the Act of 1950 itself, for s. 3 (3), which enables the consent of any person to be given to an

(1) 109 J.P. 95; [1945] 1 All E.R. 290.

adoption order without knowing the identity of the applicant for the order, provides that

" . . . where consent so given by any person is subsequently withdrawn on the ground only that he does not know the identity of the applicant, his consent shall be deemed for the purposes of this section to be unreasonably withheld."

If in circumstances such as those of the present case a documentary consent given under s. 4 (1) and afterwards withdrawn were to be held against the parent who gave it and made a ground for regarding his or her subsequent withholding of consent as unreasonable, the result would be tantamount to making the documentary consent irrevocable, which it plainly is not intended to be by the Act, and which it is plainly stated not to be in the prescribed form, set out in the Adoption of Children (County Court) Rules, 1949 (S.I., 1949, No. 2396), sched. I, which contains the words:

" I understand that, when the application for an adoption order in respect of [the infant] is heard by the judge, this document may be used as evidence of my consent to the making of the order unless I have notified the court that I no longer consent."

That extract from the prescribed form strongly suggests that, in the event of notification that the consenting party no longer consents, the document is not to be used as evidence at all. If it can be so used, it can only be evidence of the fact that the person concerned, who at the time of the hearing is withholding consent, did at the date of signing the document consent to the proposed adoption, and has subsequently changed his or her mind. But why should a parent not change his or her mind on a vital question of this sort? The question for the judge at the hearing surely is whether in the circumstances as they then stand the parent's withholding of consent can properly be considered as unreasonable. To that question the fact that he or she on some earlier date signed a documentary consent since withdrawn seems to us to be wholly irrelevant. The mere fact that the previous consent was given by no means argues that it could not have been reasonably withheld, and if it could have been reasonably withheld it must be capable of being reasonably withdrawn. Our view on this aspect of the case is fortified by the special provision in s. 3 (3), to which we have already referred. In the special case dealt with by that provision of a consent to an order for adoption by an applicant of unknown identity, if the person giving such consent subsequently withdraws it on the ground only that he does not know the identity of the applicant, his consent is to be deemed to be unreasonably withheld. The special character of this provision seems to us to afford a strong indication, if indication be needed, that in cases not covered by it a person is not to be regarded as unreasonably withholding consent merely because he or she has previously given a consent which has been withdrawn prior to or at the hearing.

We have now dealt with the three grounds on which we take the learned judge's decision to have been based, and we find ourselves unable to regard them either individually or in combination as grounds capable in law of satisfying him that the mother's consent was in this case unreasonably withheld. This court has had the advantage, denied to the learned judge, of being referred to the case in the Queen's Bench Divisional Court of *Hitchcock v. W.B.* (1), which was decided only two days before the present case was heard by the learned judge and was probably not then available in any report. That

(1) 116 J.P. 401; [1952] 2 All E.R. 119; [1952] 2 Q.B. 501.

decision, both in its result and in the reasoning on which it is based, accords with the reasons and conclusion above expressed, and we find ourselves in complete agreement with it. It follows that, in our view, the first of the two questions posed above should be answered in the negative, and this appeal should, accordingly, be allowed.

That being so, the second question, concerning the effect on the validity of the proceedings of the infancy of the mother herself and the omission to provide her with a guardian ad litem, need not strictly be answered, but, as it is a question of not uncommon occurrence, we may, perhaps, usefully make some reference to it. The appointment of a guardian ad litem of the infant proposed to be adopted is provided for in s. 8 (4) and (5) of the Act, and in rr. 6 to 9 of the Adoption of Children (County Court) Rules, 1949, which, under para. 11 of sched. V to the Act of 1950, have effect as rules made under that Act. In the present case the Derby Education Committee was so appointed, and was represented at the hearing of the appeal. No provision appears to be made in the Act for the case of an infant parent, except that s. 2 (1) (c) contemplates that an adoption order in respect of an infant may be made in favour of its mother or father although she or he is under the age of twenty-one. Cases in which the mother of the infant proposed to be adopted otherwise than by the mother herself is under the age of twenty-one have been of frequent occurrence, and in such cases the practice under the Act of 1926, and, no doubt, also under the Act of 1950, has been to accept the consent of the infant mother as a valid consent for the purposes of those Acts, rather than to treat the mother as "incapable" of giving consent under s. 3 (1) (c) of the Act of 1950 or the corresponding provision in s. 2 (3) of the Act of 1926: see *Re A.B.* (1). We think this is clearly right. It would surely be monstrous to dispense with an infant mother's consent on the ground that infancy amounts to incapacity for this purpose, especially as under s. 5 (1) (b) of the Act of 1950 the wishes of the infant child (necessarily of far more tender age) are to be considered.

The learned judge in the present case was not informed of the infancy of the mother until after the hearing of May 29, 1952, at which the order under appeal was made. In his considered judgment of June 14, 1952, he referred to *Re A.B.* (1), and after mentioning Ord. 5, r. 13, of the County Court Rules, 1936, as suggesting, in conjunction with the provisions of the Adoption of Children (County Court) Rules, 1949, under which the mother, as a parent, is made a respondent in the proceedings, that an infant mother should be provided with a guardian ad litem and saying that he thought it very desirable that the matter should receive consideration from the Court of Appeal, he decided

"to follow what appeared to be the prevailing practice and ignore from a procedural and technical point of view the fact that the respondent mother was and had at all material times been an infant."

We have inquired as to the practice followed in the Chancery Division where infant parents are concerned, and understand that it is not the practice in that Division to appoint a guardian ad litem of an infant parent. Under the Adoption of Children (High Court) Rules, 1950 (S.I., 1950, No. 80), the only parties to the application are the proposed adopter as applicant and the infant proposed to be adopted as respondent: see r. 2. A parent receives notice of the application under r. 9 and r. 13, and under r. 14 is entitled to appear before the judge to show cause why an adoption order should not be made. But as

(1) 113 J.P. 353; [1949] 1 All E.R. 709; sub nom. *Re D.X.*, [1949] Ch. 320.



he or she is not a party to the proceedings the appointment of a guardian ad litem of an infant parent is not considered necessary. The guardian ad litem of the infant proposed to be adopted (ordinarily the Official Solicitor: see r. 5) is charged (see r. 10) with duties of investigation which include interviewing the parent or parents. It is thought (no doubt rightly) that in all ordinary cases the judge, assisted by the Official Solicitor's investigations, and himself interviewing any infant parent when it appears proper to do so, is well able to safeguard the interests of the infant parent without the interposition of a guardian ad litem, which, in view of the confidential character of the proceedings, would be an undesirable complication. We are told that in exceptional cases such as the present case, in which an infant mother opposes the application and the applicants seek to obtain an order against her will on the ground that her consent is unreasonably withheld, suitable arrangements could without difficulty be made for her representation by counsel.

We find nothing to criticise in the practice of the Chancery Division on this point. The Adoption of Children (County Court) Rules, 1949, are differently framed. The material difference for the present purpose is that under rr. 1 and 9 a parent is not only served with notice of the application, but is made a respondent in the proceedings. By r. 27 it is provided:

"Subject to these rules, the County Court Rules shall apply to proceedings under the Adoption of Children Acts, 1926 to 1949 [now the Act of 1950] so far as they are applicable."

Order 5, r. 13 and r. 14, of the County Court Rules, 1936, contain provisions which require the appointment of a guardian ad litem, as to r. 13, where it appears on the face of the proceedings that a defendant is an infant, and as to r. 14, where it appears in the course of the proceedings that a defendant is an infant. Under Ord. 49, r. 2, "defendant" includes "respondent". It is, therefore, difficult to resist the conclusion that, under the Adoption of Children (County Court) Rules, 1949, as they stand, a guardian ad litem of an infant parent who is a respondent in adoption proceedings ought to be appointed on its appearing on the face of or in the course of the proceedings that he or she is an infant. In the ordinary case where all that is necessary is that the judge should be satisfied of the parent's consent, and should, where there is any doubt, personally ascertain the real wishes of the parent in the matter, no useful purpose would be served by the appointment of a guardian ad litem, for the order will not be made unless the parent does consent, but in rare cases of the present kind, where an infant parent opposes and an order is sought against that parent's will on the ground that his or her consent is unreasonably withheld, the question whether a guardian ad litem should be appointed or the High Court practice followed *mutatis mutandis* is one in regard to which the position should be made clear in the rules.

*Appeal allowed.*

Solicitors: *Gibson & Weldon*, agents for *Miss M. A. Booth*, Derby (for the mother); *Maddisons & Lambs*, agents for *Irving, Sitdown & Co.*, Derby (for the applicants); *Sharpe, Pritchard & Co.*, agents for *E. H. Nichols*, town clerk, Derby (for the education committee).

G.F.L.B.



PRACTICE NOTE

QUEEN'S BENCH DIVISION

(SLADE AND HAVERS, JJ.)

Nov. 4, 1952

COLLYER v. DRING

*Practice—Case stated—Appeal from quarter sessions—Extension of time for appeal—“Special circumstances”—Solicitor's inadvertence or negligence—R.S.C., Ord. 59, r. 30 (2).*

A solicitor's inadvertence, resulting in delay in making application to enter for hearing an appeal from quarter sessions to the Divisional Court, may constitute “special circumstances” conferring discretion on the court to grant an extension of time beyond the six months laid down in R.S.C., Ord. 59, r. 30 (2).

At a court of summary jurisdiction sitting at Epping, Essex, on Jan. 25, 1952, the applicant was convicted of having driven a car on a road without due care and attention and without a licence, contrary to the Road Traffic Act, 1930, s. 12 (1) and s. 4 (1), and of having used a car on a road without a policy of insurance or security in respect of third party risks in relation to such use, contrary to s. 35 (1) of the Act. She appealed to Essex Quarter Sessions sitting at Chelmsford against her convictions, and on Mar. 13, 1952, her appeal was dismissed. Quarter sessions having stated a Case for the opinion of the High Court, on Sept. 13, 1952, an application to the Crown Office to enter the appeal for hearing was refused on the ground that it was not accompanied by the recognisance. On Sept. 18 a further application, then accompanied by the recognisance, was refused on the ground that it was out of time, being made “after the expiration of six months from the date of the judgment” and so did not comply with R.S.C., Ord. 59, r. 30 (2). The applicant applied to the court for leave to enter the appeal out of time, alleging her solicitor's inadvertence as “special circumstances” for granting leave under the rule.

By R.S.C., Ord. 59, r. 30:

“(1) An appeal from a court of quarter sessions by way of Case Stated, shall not be entered for hearing unless and until—(a) the Case and a copy of the judgment, order or decision in respect of which the Case has been stated and, if that judgment, order or decision was given or made on an appeal to quarter sessions, a copy of the judgment, order or decision appealed from, have been lodged in the Crown Office and Associates' Department; and (b) the appellant has, for the purpose of securing the prosecution of the appeal, entered into a recognisance in the sum of £50 with sufficient sureties before the court of quarter sessions, or paid the said sum into the High Court, except where the parties by consent in writing dispense with such recognisance or payment . . . (2) No such appeal as aforesaid shall be entered for hearing after the expiration of six months from the date of the judgment, order or decision in respect of which the Case was stated, except by leave of the Divisional Court on special circumstances being shown . . .”

*D. J. L. Fitzgerald* for the applicant.

*Waddilove* for the respondent.

**SLADE, J. :** The question is whether a lay client in a criminal cause or matter must suffer on account of her ignorance of purely procedural matters through the inadvertence or negligence of a professional man, or whether such inadvertence or negligence can amount to “special circumstances” conferring

a discretion on the court to grant an extension of time under R.S.C., Ord. 59, r. 30 (2). The court will deal with the application on the basis that such inadvertence or negligence may constitute "special circumstances" and on the facts of the case it holds that such "special circumstances" have been shown. That must not be taken to mean that an extension of time will always be granted in case of inadvertence or negligence of professional clients.

**HAVERS, J. :** I agree.

*Application granted.*

Solicitors: *J. H. Fellowes* (for the applicant); *A. Morgan*, prosecuting solicitor, Essex County Council (for the respondent).

F.A.A.

### SALOP ASSIZES

(HALLETT, J.)

July 14, 15, 16, 17, 18, 21, 23, 24, 28, 1952

MERRINGTON *v.* IRONBRIDGE METAL WORKS, LTD. AND OTHERS

*Fire Service—Fireman injured by explosion—Liability of occupiers—Invitee—Exceptional and unnecessary dangers of fire and explosion created by occupiers—Volenti non fit injuria.*

The defendants were the occupiers of a factory in which they carried on the business of extracting the aluminium in aluminium foil. As a result of the processes carried on at the factory large quantities of fine dust containing aluminium and carbon particles were created. This dust lay in thick deposits in numerous places all over the factory, and the defendants took no steps to prevent or lessen its creation or to remove it. While fighting a fire at the factory in the course of his duties as a part-time fireman, the plaintiff was injured by a dust explosion caused by the exceptional and unnecessary dangers of fire and explosion which the defendants had created and maintained on the premises. In an action by the plaintiff claiming damages for negligence, the defendants denied liability and pleaded, *inter alia*, that the plaintiff attended the fire with knowledge of the attendant risk of injury to himself and voluntarily incurred that risk.

**HELD:** (i) the maxim *volenti non fit injuria* applied only if the plaintiff was both (a) *sciens*, i.e., he fully appreciated the dangerous character of the physical condition brought about by the negligence of the defendants, and (b) *volens*, i.e., he had consented to assume the risk without compensation; a man could not be said to be *volens* unless he was in a position to choose freely, and if he was acting under the compulsion of a duty his consent should rarely, if ever, be inferred (*Bowater v. Rowley Regis Corpn.* (1944) (108 J.P. 163) applied); on the facts, the plaintiff was neither *sciens* nor *volens*, and he had not impliedly agreed to give up any rights which he would have had but for such agreement.

(ii) the fire brigade having been summoned by the defendants' servant who was in charge of the factory at the time, the plaintiff was an invitee, but he could not succeed on the basis of a breach by the defendants of their duty to an invitee as it was not shown that he would have avoided the danger if he had been informed of it, and the probabilities were that he would not have done so.

(iii) the rights of a fireman who properly attends a fire cannot depend on how he comes to be there, for the fire brigade can attend the fire in the exercise of the powers conferred on them by the Fire Services Act, 1947, s. 30 (1), or they can be summoned, for example, by a policeman or a passer-by.

(iv) there was a duty on the defendants not to have their factory in the dangerous condition in which it was, and they knew or ought to have known (a) that by lack of reasonable care they were creating and maintaining exceptional and serious risks of fire and explosion in the factory, (b) that by reason of such risks a fire was likely to occur, (c) that, if a fire did occur, members of the fire service were

likely to enter the premises to deal with it in the course of their duty, and (d) that, if firemen entered the premises to deal with the fire, they would be exposed to an exceptional and serious risk of being injured by explosion, and, therefore, their duty not to have their factory in that dangerous condition was a duty which the defendants owed towards the firemen and they were liable to the plaintiff in damages.

Dictum of LORD ATKIN in *M'Alister (or Donoghue) v. Stevenson* ([1932] A.C. 580), applied.

#### ACTION for damages for personal injuries.

On May 12, 1950, during the course of his duties as a part-time fireman in the Salop County Council fire brigade, the plaintiff went to deal with a fire at a factory occupied by the first defendants, Ironbridge Metal Works, Ltd., and was injured by an explosion following on the fire. The factory was used by the first defendants for the extraction of the aluminium in aluminium foil, and, as a result of the processes carried on there, large quantities of fine dust which included aluminium and carbon particles were created. No steps were taken by the first defendants to prevent or lessen the creation of this dust or to dispose of it. The factory was of such construction as to afford a multitude of places where the dust could lie and those places had thick deposits of dust on them. The fire started in a large pile of debris at about 11.20 a.m. At 12.20 p.m. a servant of the first defendants, who was then in charge of the factory, summoned the fire service and told them that foam equipment would be required, but he did not warn them of the presence of aluminium. Until the arrival of the firemen, one of the first defendants' servants played water on the debris, but the firemen at no time applied water. Not knowing that the fire area contained aluminium, or that any danger of explosion would be created by the application of foam, the firemen played foam on the fire to the knowledge of the first defendants' managing director and without any objection on his part. There was no sand available at the factory. After the fire appeared to be out, the senior fire brigade officer was informed, for the first time, that "it was aluminium". Shortly afterwards a flame broke through the foam blanket, the officer had foam put on the fire again for a short time, and then had the foam branch withdrawn. Shortly afterwards an explosion occurred in which the plaintiff was injured. The factory and its contents were destroyed, the managing director was killed, and other persons were injured.

In an action for damages against the first defendants and the executors of the managing director, as the second defendants, the plaintiff alleged (a) negligence, and (b) a breach of duty under the Factories Act, 1937, s. 28 (1). The allegation of negligence was, in substance, that the first defendants and the managing director conducted their business at the factory so carelessly as to create and maintain therein two kinds of serious, exceptional, and wholly unnecessary risks, viz., (i) fire risks, and (ii) risk of a dust explosion. In their defences the defendants denied the responsibility for the fire and blamed the fire brigade for the explosion. Accordingly, the plaintiff, by amendment, added the Salop County Council, the authority made responsible for the fire services of the county under the Fire Services Act, 1947, s. 4, as the third defendants. The third defendants accepted liability to compensate the plaintiff if the explosion could be shown to have been caused wholly or in part by negligence on the part of his fellow members of the fire service. The first and second defendants also instituted third party proceedings against the third defendants, alleging inter alia (a) that the fire brigade officers knew or ought to have known that the fire contained aluminium and that the danger of explosion would be created by the use and application of water and foam to and near the fire, (b) that they caused or permitted such application, and (c) that they so caused

or contributed to the explosion and consequent injury. Against the plaintiff, the first and second defendants pleaded (a) contributory negligence, but this plea was abandoned during the trial, and (b) that the plaintiff attended the fire with knowledge of the attendant risks of injury to himself and voluntarily incurred the risk of injury.

*Sir Frank Soskice, Q.C., Pain and A. C. Cole* for the plaintiff.

*Ryder Richardson, Q.C., and Fife* for the first defendants, Ironbridge Metal Works, Ltd.

*Fearnley-Whittingstall, Q.C., J. C. Lawrence and J. E. M. Irvine* for the second defendants, the executors of the first defendants' managing director.

*Fox-Andrews, Q.C., N. A. Carr and A. S. Orr* for the third defendants (and third party), Salop County Council.

*Cur. adv. vult.*

July 28. **HALLETT, J.**, stated the facts, and said: Having regard to the broad way in which leading counsel for the plaintiff put his case when opening, I desire to emphasise that I am deciding the rights of the plaintiff on the facts of this particular case, and I am not purporting to lay down the rights of members of the fire service generally when injured in the course of their fire-fighting duties.

[Dealing with the defences raised by the first and second defendants, His LORDSHIP said that there was no evidence to justify the plea of contributory negligence, and continued:] The other defence, in which the first and second defendants are still persisting, is that the plaintiff

" . . . attended the said fire with knowledge of the attendant risks of injury to himself and voluntarily incurred the risk of injury."

Many of the cases in which the doctrine of *volenti non fit injuria* has been considered have been cases of master and servant where special considerations apply: see *SALMOND ON THE LAW OF TORTS*, 10th ed., p. 34. The decision in *Dann v. Hamilton* (1) is not binding on me, but I am satisfied that the doctrine can have no application unless the plaintiff is at least *sciens*, that is to say, he fully appreciates the dangerous character of the physical condition which has been brought about by the negligence of the defendant. Accordingly, in my judgment, the plea of *volenti* in this case breaks down at the outset because there is no evidence whatsoever that the plaintiff attended the fire with knowledge of the attendant risks of injury to himself. On the contrary, such little evidence as there is on the point supports the opposite conclusion.

Next, it is well settled that to be *sciens* is not enough. The plaintiff must also be *volens*, that is to say, a real consent to the assumption of the risk without compensation must be shown by the circumstances. It is a question of fact in each case and not of law. If, however, a man acts under the compulsion of a duty, such a consent should rarely, if ever, be inferred, because a man cannot be said to be "willing" unless he is in a position to choose freely: see *Bowater v. Rowley Regis Corpn.* (2), and for illustrations of this principle, *D'Urso v. Sanson* (3), *Haynes v. Harwood* (4), and other cases cited in the text-books. The question of consent being one of fact, I unhesitatingly find that there was no consent on the part of the plaintiff. The argument for the first and second defendants is that, because every fireman knows that his work when attending fires may involve some risk, he impliedly agrees in advance

(1) [1939] 1 All E.R. 59; [1939] 1 K.B. 509.

(2) 108 J.P. 163; [1944] 1 All E.R. 465; [1944] K.B. 476.

(3) [1939] 4 All E.R. 26.

(4) [1935] 1 K.B. 146.



to accept without recourse against a person negligently causing it every risk at every fire, however exceptional, unknown to him, and even unforeseeable by him the particular risk may be. No authority was cited to me for such a contention, although it was argued that support for it can be derived—I do not know why—from s. 30 of the Fire Services Act, 1947. I regard the contention as plainly unsound. I shall discuss later what duty, if any, the first and second defendants owed towards the plaintiff and on what ground or grounds, if any, he can recover compensation from them for injuries occasioned by their carelessly causing exceptional risks of fire and explosion at their factory. For the moment I am only holding as a matter of fact that he did not impliedly agree to give up any rights which he would have had but for such agreement. This may be a convenient moment to say emphatically that I do not accept the submission of leading counsel for the plaintiff that, if a fireman sustains injury as the result of performing his duty at a fire, he ipso facto becomes entitled to recover compensation from any person whose carelessness has caused the fire in question.

[His LORDSHIP reviewed the evidence and came to the conclusion that there was both a small visible and superficial fire which seemed to be, and, perhaps, was, mastered, and also a deep-seated and, at first, unperceived fire which was not mastered and could never have been mastered, except, possibly, by the application of large quantities of sand, which were not available. His LORDSHIP found that the fatal explosion was not a hydrogen explosion, as the first and second defendants sought to maintain, but a dust explosion which arose from the quantities of dust lying all over the factory and containing aluminium and carbon particles. He was not satisfied that what the fire brigade did contributed in any degree to causing the explosion and amounted to *novus actus interveniens*, he thought that the explosion would probably have occurred even if the fire brigade had done nothing, he exonerated its members from the charge of negligence which was brought against them, and he continued:] I have held (a) that none of the allegations of negligence made against the third defendants has been established, and (b) that the explosion which injured the plaintiff was not a hydrogen gas explosion. I think, however, that the application of foam to the fire would produce hydrogen gas in considerable quantities, and, accordingly, if I had held the opposite way on both points (a) and (b), I should have held the third defendants responsible to the plaintiff for contributing in some degree to the explosion. But, as between the defendants, I should even then have attributed only a very small share of the responsibility to the third defendants.

It remains to deal with the rights of the plaintiff as against the first and second defendants. I have held that the explosion which injured the plaintiff arose from the exceptional and unnecessary dangers of fire and explosion which those defendants created and maintained on their premises, but the plaintiff must further show that those defendants have committed some breach of a duty which they owed to him. Cases dealing with the liability for fire or explosion of an employer towards his employee, or of an occupier towards his neighbour, in the ordinary sense of neighbour, do not assist me. On the facts of this case I think that the plaintiff clearly was an invitee of those defendants, because their servant, who was then in charge of their factory, sent for the fire brigade. I am, therefore, prepared to hold that they owed to him the well known duty of an invitor towards an invitee, and, if so, they certainly did not perform that duty. They did not use reasonable, or any, care to remove the danger of explosion, nor did they give to the invitee due or any warning of the existence

of that danger although they both ought to have known, and, in my judgment, did know, of its existence. A difficulty, however, which I see in the way of the plaintiff succeeding on this basis is that there is no evidence to show that he would have avoided the danger if he had been informed of it. He might have told his superior officer and that officer might have withdrawn him out of the danger zone, but this is mere speculation, and I think that on the whole the probabilities are the other way. Furthermore, I can hardly think that the liability towards a fireman depends on his being an invitee. The fire brigade may be summoned to a fire by the occupier of the premises concerned, but they may equally well be called by a policeman or by a passer-by. In fact, a passer-by called the firemen to a fire on the defendants' premises on the previous evening. Moreover, they may attend in the exercise of the powers conferred on them by s. 30 (1) of the Fire Services Act, 1947, and absence of consent clearly negatives invitation. I can hardly think that the rights of a fireman who properly attends a fire can depend on how he came to be there.

It is agreed by counsel that the point here raised is novel and is not covered by any authority, but I have consulted the cases which were mentioned as likely to assist me—in particular, *Haynes v. Harwood* (1), *D'Urso v. Sanson* (2), *Steel v. Glasgow Iron & Steel Co., Ltd.* (3) and *Hyett v. Great Western Ry. Co.* (4). If I were trying this case with a jury I would ask them the following questions: (i) Did the first and second defendants know, or (ii) ought they to have known, (a) that by lack of reasonable care they were creating and maintaining exceptional and serious risks of fire and explosion in their factory; (b) that, by reason of such exceptional and serious risks of fire, a fire was likely to occur; (c) that, if a fire did occur, members of the fire service were likely to enter the premises to deal with it in the course of their duty; and (d) that, if members of the fire service did enter the premises to deal with the fire in the course of their duty, they would be exposed to an exceptional and serious risk of being injured by explosion? Putting those questions to myself in the absence of a jury I answer all of them in the affirmative, and I hold that such answers entitle me to give judgment, as I intend to, for the plaintiff against the first and second defendants.

As to authority, in *M'Alister (or Donoghue) v. Stevenson* (5) LORD ATKIN said ([1932] A.C. 580):

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."

These well-known words seem to me to fit the present facts very closely, but I am, of course, aware that the principle there expounded must be applied with caution. I cannot, I think, derive any help from cases where the duty was plain and the real point was whether the damage was a sufficiently foreseeable consequence of the breach of duty. The last sentence of s. 120, para. 4, of SALMOND ON THE LAW OF TORTS, 10th ed., p. 435, in connection

(1) [1935] 1 K.B. 146.

(2) [1939] 4 All E.R. 26.

(3) 1944 S.C. 237.

(4) [1947] 2 All E.R. 264; [1948] 1 K.B. 345.

(5) [1932] A.C. 562.

with *Hay (or Bourhill) v. Young* (1) points out this distinction. In *Haynes v. Harwood* (2) GREER, L.J., pointed out ([1935] 1 K.B. 152) that:

"Negligence in the air will not do; negligence, in order to give a cause of action, must be the neglect of some duty owed to the person who makes the claim."

In that case the court found a plain duty owed to users of the highway not to leave horses unattended, and from that starting point discussed and decided questions of *novus actus interveniens*, foreseeability, and *volenti*.

In this case I must decide whether there existed a duty on the part of the first and second defendants not to have their factory in this dangerous condition, and whether, in all the circumstances, that duty was owed by them towards the firemen. *D'Urso v. Sanson* (3), is superficially much nearer to the present case than *Haynes v. Harwood* (2), and would, indeed, have provided me with an authority if D'Urso had been a fireman and not a night watchman, but the relation of master and servant may be said to make all the difference, since an employer is plainly liable to an employee for the reasonable safety of the factory where he works, whether as night watchman or in any other capacity, and whether as regards fire or any other danger. I must, therefore, rely, as I have said, on principle and not on authority, since no really relevant case has been cited to me. I have already pointed out and emphasise again that my judgment depends on the particular facts of this case and will not provide the wide authority for which leading counsel for the plaintiff, in his opening, appeared to be hoping. Counsel also desired to rest his case on an alleged breach by the first and second defendants of the Factories Act, 1937, s. 28 (1). He thought that it would be an advantage not to have to establish negligence as regards the dust and to have a statutory breach with which to meet the defence of *volenti*. There is authority that the defence of *volenti* is not available to a master as against his servant in respect of a statutory breach (see *Wheeler v. New Merton Board Mills, Ltd.* (4)) because, I think, the servant cannot contract out of the protection provided for him by Parliament. In the view which I have taken of the facts the plaintiff does not need either of those advantages, but counsel on his behalf wishes to keep the allegation of a statutory breach open. I am by no means certain that this was a process *eiusdem generis* with grinding or sieving. I think that something more than the mere escape of dust was necessary to make it liable to explode on ignition, and for these reasons, among others, I doubt whether the section applies. If it does apply, a further and very formidable point arises whether the plaintiff can rely on it. It has been settled for a very long time that a workman can rely on a breach of the Factories Acts as giving him a claim against his employer, and in two recent cases, both based on the language of s. 26 (1) of the Act, which deals with "safe means of access to every place at which any person has at any time to work", the benefit of that section has been extended to an employee of an independent contractor: see *Whitby v. Burt, Boulton & Hayward, Ltd.* (5) and *Lavender v. Diamints, Ltd.* (6). In the latter of those cases TUCKER, L.J., did say generally ([1949] 1 All E.R. 535) that Part II of the Act of 1937 had, in his opinion, "not the limited application contended for by the defendants," but as regards sections other than s. 26

(1) [1942] 2 All E.R. 396; [1943] A.C. 92.

(2) [1935] 1 K.B. 146.

(3) [1939] 4 All E.R. 26.

(4) [1933] 2 K.B. 669.

(5) 111 J.P. 481; [1947] 2 All E.R. 324; [1947] K.B. 918.

(6) [1949] 1 All E.R. 532; [1949] 1 K.B. 585.

this remark was obiter. To hold that s. 28 (1) operates for the benefit of firemen fighting a fire would be going far beyond any previous decision, and I prefer respectfully to leave the questions arising under s. 28 (1) to be decided if necessary elsewhere. [His Lordship assessed the damages at £14,000, in addition to the special damages agreed at £1,000, and gave judgment for the plaintiff against the first and second defendants for the sum of £15,000.]

*Judgment for plaintiff against first and second defendants.*

Solicitors: *W. H. Thompson* (for the plaintiff); *William Charles Crocker* (for the first defendants); *Adler & Perowne* (for the second defendants); *Sharpe, Pritchard & Co.*, agents for *G. C. Godber*, clerk of Salop County Council (for the county council).

G.F.L.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., FINNEMORE AND MCNAIR, J.J.)

Oct. 23, 24; Nov. 7, 1952

#### DOMINANT SITES, LTD. v. HENDON BOROUGH COUNCIL

*Town and Country Planning—Advertisement—Display “on date on which regulations came into force”—Enforcement notice requiring discontinuance of display—Advertisement in area to which scheme under Town and Country Planning Act, 1932, applied—Town and Country Planning (Control of Advertisements) Regulations, 1948 (S.I., 1948, No. 1613), reg. 23.*

A borough council made a planning scheme under the Town and Country Planning Act, 1932, the scheme coming into operation on Aug. 26, 1936. Under it (inter alia) certain land was specified under s. 47 of the Act as land protected in respect of advertisements. The Town and Country Planning Act, 1947 (which came in force on July 1, 1948), by s. 31 (1) gave a new power of control of advertisements to the local planning authority, and by s. 31 (5) enabled regulations to be made “so as to apply to advertisements which are being displayed on the date on which the regulations came into force.” By the Act of 1947 the Act of 1932 was repealed, except that by sched. X, para. 7 (a), of the Act of 1947 any scheme made under the Act of 1932 remained in force so far as it related, inter alia, to the control of advertisements under s. 47 of the Act of 1932, and the provisions of that Act were to “have effect in relation to any such scheme accordingly”. Prior to the coming into force of the regulations on Aug. 1, 1948, a company, on July 8, 1948, erected advertisement hoardings on land included in the scheme. On Aug. 17, 1949, the council, to whom the local planning authority had delegated its powers, required the company to make application, as prescribed in the regulations, for the express consent of the council for the hoardings on the land. The company applied, but the council refused consent, and their decision was affirmed by the Minister of Town and Country Planning. On June 1, 1951, the council served on the company enforcement notices requiring the discontinuance of the display of advertisements under reg. 23 (1). The company did not comply with the notices, and complaints were preferred by the company by way of appeal under reg. 23 (4) to a court of summary jurisdiction, and were dismissed. That decision having been affirmed at quarter sessions, the company appealed to the Divisional Court.

**HELD** (FINNEMORE, J., dissentiente): that there was no conflict or inconsistency between the powers conferred on the local authority by the regulations made under the Act of 1947 and the powers of the responsible body under the Act of 1932 and the scheme made thereunder; that, as either authority was entitled to exercise the powers conferred on it by the respective enactments, the council in their capacity as the agents of the local planning authority were entitled to



serve the enforcement notices; and, therefore, the notices were valid and the decisions of the magistrates and quarter sessions were right.

CASE STATED by the appeal committee of Middlesex Quarter Sessions.

At the County of Middlesex Quarter Sessions on Dec. 19, 1951, the appellants, Dominant Sites, Ltd., appealed against the dismissal by a court of summary jurisdiction sitting at Hendon on Oct. 11, 1951, of two complaints, preferred by them against the respondents, Hendon Borough Council, by way of appeal under the Town and Country Planning (Control of Advertisements) Regulations, 1948, reg. 23 (4), against two enforcement notices dated June 1, 1951, served on the appellants under reg. 23 (1), requiring them to discontinue the use of certain land for the display of advertisements, to remove therefrom two advertisement hoardings, and to restore the land to its condition before the display of advertisements was begun.

It was proved or admitted that the Hendon Planning Scheme, No. 1, made under the Town and Country Planning Act, 1932, s. 47, became operative on Aug. 29, 1936, and had continued in force in accordance with the Town and Country Planning Act, 1947, sched. X, para. 7, and not been determined by the Minister. The land on which the two advertisement hoardings were erected was within the area to which the scheme related. The hoardings were erected on July 8, 1948, and before the coming into operation of the Town and Country Planning (Control of Advertisements) Regulations, 1948. The hoardings were erected without express consent obtained under the regulations, and were subject to the period of grace conferred by reg. 7. By notices dated Aug. 17, 1949, the respondents, to whom the Middlesex County Council as the local planning authority, pursuant to the Act of 1947, had delegated their powers in this respect, required the appellants to make application for express consent for the retention of the hoardings. On Aug. 30, 1949, the appellants made application, but, by notices dated Oct. 26, 1949, and Nov. 1, 1949, the respondents refused such consent. On Nov. 7, 1949, the appellants appealed against such refusal to the Minister of Town and Country Planning, who, on Nov. 16, 1950, dismissed the appeals. On June 1, 1951, the respondents, as the duly authorised agents of the Middlesex County Council, served on the appellants two enforcement notices under reg. 23 (4) of the regulations of 1948.

It was contended on behalf of the appellants that the regulations did not apply to the advertisements; that the Hendon Planning Scheme, No. 1, made under the Act of 1932, s. 47, was preserved by the Act of 1947, sched. X, para. 7 (c); that the rights of an advertiser under this scheme to erect his advertisements without consent first obtained, subject to challenge on the ground that it seriously injured amenity and to an appeal against such challenge to a court of summary jurisdiction on the merits, were also preserved; and that the regulations did not confer on a local planning authority a dual jurisdiction over advertisements by means of the machinery of the said regulations. It was contended on behalf of the respondents that the scheme and the regulations of 1948 were not mutually exclusive; that the power given by the regulations was permissive and discretionary; that the responsible authority under the scheme was not the local planning authority under the Act of 1947; and that the scheme was still in force and the jurisdiction under it preserved while the regulations in certain respects enlarged it. Quarter sessions were of the opinion that the regulations were supplementary to the powers under the Act of 1932, that there was no conflict between them, and that the respondents were entitled to elect whether they would take action under the Act of 1932 and the scheme or under the Act

of 1947 and the regulations. They, accordingly, dismissed the appeals and the appellants now appealed to the High Court.

*Lyons, Q.C., and S. W. Magnus* for the appellants.

*Molony* for the respondents.

*Cur. adv. vult.*

Nov. 7. The following judgments were read.

**McNAIR, J. :** By two enforcement notices dated June 1, 1951, made by the respondents under the Town and Country Planning (Control of Advertisements) Regulations, 1948, the appellants were required to discontinue the use of certain land situate at Northway Circus, Mill Hill, for the display of advertisements and to remove therefrom two advertisement hoardings. On June 26, 1951, the appellants, pursuant to reg. 23 (4) of these regulations preferred two complaints by way of appeal against these enforcement notices. These complaints were heard by the justices sitting at the Gore petty sessional court, Hendon, and were dismissed. These dismissals were, on appeal, confirmed by the justices of the County of Middlesex Quarter Sessions on Dec. 19, 1951, and the appellants now appeal to this court by way of Case Stated against that decision.

In order that the question of law which is raised in this appeal may be appreciated it is necessary to set out the following facts which were proved or admitted together with a summary of the relevant statutory provisions. Pursuant to powers contained in the Town and Country Planning Act, 1932 (hereinafter referred to as the Act of 1932) a town planning scheme known as the Hendon Town Planning Scheme, No. 1, 1935, was made by the respondents and approved subject to modification by the Minister of Health. This scheme became operative on Aug. 29, 1936. By cl. 51 (1) of this scheme the respondents specified certain land, including the land in question, as land protected in respect of advertisements under s. 47 of the Act of 1932. So long as this part of the scheme and s. 47 of the Act of 1932 remains in force the respondents have power to serve on the owner of any advertisement or hoarding (other than advertisements or hoardings the display of which they have authorised pursuant to cl. 51 (2)) a notice requiring him to remove it within a specified period subject to the right of any person aggrieved to appeal to a court of summary jurisdiction. On any such appeal the court, if satisfied that the advertisement or hoarding does not *seriously injure the amenity* of the land specified in the scheme, is required to allow the appeal. By the Town and Country Planning Act, 1947 (hereinafter referred to as the Act of 1947), which, so far as is material for the purpose of this case, came into force on the appointed day, namely, July 1, 1948, the Act of 1932 was repealed, but, by virtue of s. 113 and sched. X, para. 7, it was provided that:

"Notwithstanding the repeal by this Act of the Act of 1932, any scheme made under that Act . . . being a scheme which is in force immediately before the appointed day shall, so far as it relates [to] (c) the control of advertisements in areas protected under s. 47 of the Act of 1932 . . . continue in force until it is determined, in relation to any such matter as aforesaid, by an order made by the Minister, and the provisions of that Act . . . shall have effect in relation to any such scheme accordingly."

No order has been made by the Minister determining the scheme in relation to the control of advertisements. By s. 31 of the Act of 1947 a new power for the control of advertisements was enacted. That section enacts that:

" . . . provision shall be made by regulations under this Act for . . .

regulating the display of advertisements so far as appears to the Minister to be expedient in the interests of amenity or public safety, and . . . any such regulations may provide . . . (d) for enabling the local planning authority to require the removal of any advertisement which is being displayed in contravention of the regulations . . . ”

On July 8, 1948, the advertisement hoardings in question were erected. On Aug. 1, 1948, the Town and Country Planning (Control of Advertisements) Regulations, 1948, made under s. 31 of the Act of 1947, came into operation. By these regulations the control of advertisements was placed in the hands of the local planning authority, the local planning authority for the area in question being the Middlesex County Council, but provision was made for granting a limited exemption for existing advertisements subject to the right of the local planning authority to require the owner of any existing advertisement to apply within a specified period of grace for express consent to the continuance of any existing advertisements. But, whereas under s. 47 of the Act of 1932 a person aggrieved by such a notice had a right of appeal to a court of summary jurisdiction which, if satisfied that the advertisement or hoarding did not seriously injure the amenity of the land in question, was required to allow the appeal, under these regulations the appeal lies to the Minister, and, if the appeal is disallowed by the Minister, a person aggrieved has no opportunity of satisfying a court of summary jurisdiction that the advertisement or hoarding does not, in fact, interfere with the amenities of the land.

[HIS LORDSHIP stated the facts and continued:] Had it been necessary for the determination of this appeal to reach a conclusion on the question whether the effect of the provisions of sched. X to the Act of 1947 was to preserve cl. 51 of the scheme, and, in particular, s. 47 of the Act of 1932, I would have desired to hear further argument as I have difficulty in seeing how it can be said that s. 47 is a provision which has effect in relation to a scheme. But, as it was conceded before us by counsel for the respondents that this was the effect, I am prepared for the purpose of this appeal to assume that it is so. Nevertheless, it seems to me to be quite clear as a matter of construction that regulations may be made under s. 31 of the Act of 1947 so as to apply to advertisements and hoardings on land which has been specified in a scheme made under the Act of 1932 as land protected under that section. Section 31 (5) is in the following terms:

“ Subject as hereinafter provided, regulations made under this section may be made so as to apply to advertisements which are being displayed on the date on which the regulations come into force, or to the use for the display of advertisements of any site which was being used for that purpose on that date: Provided that any such regulations shall provide for exempting therefrom—(a) the continued display of any such advertisement as aforesaid; and (b) the continued use for the display of advertisements of any such site as aforesaid, during such period as may be prescribed in that behalf by the regulations, and different periods may be so prescribed for the purposes of different provisions of the regulations.”

In my judgment, the express power to make regulations

“ so as to apply to advertisements which are being displayed on the date on which the regulations come into force ”,

coupled with the express exemptions mentioned in the proviso, excludes any possibility of any implied exemption in respect of advertisements covered by an existing town planning scheme. Furthermore, the fact that “ the responsible

authority " under s. 47 of the Act of 1932 is a different body from the " local planning authority " under s. 31 of the Act of 1947 and the regulations made thereunder is, in my view, fatal to any argument based on the apparent inconsistency between the two schemes, and for the purpose of this point of construction it is immaterial that the local planning authority may have delegated their powers to a body which is also a responsible authority under the Act of 1932. I can see no conflict or inconsistency between the two sets of powers. In my judgment, the justices came to a correct conclusion in this matter and the appeals should be dismissed.

**FINNEMORE, J.** (read by LORD GODDARD, C.J.): I have come to the view that these appeals should be allowed. The land on which the hoardings were erected was land subject to the Hendon Planning Scheme, No. 1 (made under the Town and Country Planning Act, 1932), and this scheme has never been revoked by the Minister. In my opinion, therefore, the regulations made under the Town and Country Planning Act, 1947, never applied to this land at all. If that is so, it is conceded that the respondents were wrong, as they proceeded under the latter Act.

Under the Act of 1932 the respondents gained powers of control over advertisements by virtue of s. 47. Under that section the respondents could serve a notice requiring the removal of an advertisement or a hoarding which " seriously " injured the amenity of the land, and the owner who received such a notice could appeal to a court of summary jurisdiction and thence to quarter sessions. These powers applied where the respondents made a scheme, and they duly made the Hendon Planning Scheme, No. 1, which came into force on Aug. 29, 1936. Clause 51 applied the provisions of s. 47 of the Act of 1932 in respect of advertisements. In 1947 a new Town and Country Planning Act was passed which gave wider and additional powers of control over the use of land, including advertisements and hoardings. For the land in question the local planning authority was the Middlesex County Council which, as it was entitled to do, delegated its powers under Part III (which includes s. 31) to the respondents to act on its behalf. Section 31 provides for regulations to restrict or regulate advertisements.

" so far as appears to the Minister to be expedient in the interests of amenity or public safety . . . "

This is a wider power than in the Act of 1932, where the phrase " seriously injures the amenity " is used, and there is no longer any appeal to the courts, but only to the Minister himself. Regulations were duly made entitled the Town and Country Planning (Control of Advertisements) Regulations, 1948, and it was under these regulations that the respondents proceeded. The appellants claimed that these did not apply at all, as the land was subject to the scheme of 1936 made under the Act of 1932. No doubt, these regulations were intended in due course to apply generally and to supersede the provisions of the Act of 1932. While, however, the Act of 1932 was repealed by the Act of 1947, it was expressly enacted by sched. X, para. 7, that any scheme made under the former Act and still in force immediately before the appointed day should continue in force until determined by an order made by the Minister and that the provisions of the Act of 1932 should continue to apply. It is agreed that the scheme has not been determined. It is, therefore, by virtue of the schedule still in force. Do the regulations of 1948 nevertheless apply, or is the land subject only to the scheme and must the procedure laid down in the scheme and s. 47 of the Act of 1932 apply? If the former, then the appellants fail, and if the latter, they succeed.



It was argued in this court, and so held in the court below, that both the scheme under the Act of 1932 and the regulations under the Act of 1947 applied to this land. With respect I cannot see how this can be. I do not think that two different provisions on the same subject—and there are differences in both substance and procedure—can apply at one and the same time to the same land. One or the other must prevail. Either the regulations of 1948 apply to the exclusion of the scheme, or the scheme applies with the full benefit of s. 47. If the regulations are, in fact, the governing force, then it seems to me to be almost beyond argument that the scheme is dead. What, then, becomes of sched. X, para. 7? This paragraph expressly keeps alive the scheme, which is to continue in force until determined by the Minister. If, in spite of this, the regulations overrule or take precedence of the scheme (presumably at the will of the respondents) I am unable to give any meaning to what seem to me to be the plain words of sched. X, para. 7. On the other hand, if the appellants' contention is accepted, I see no difficulties. Section 31 of the Act of 1947 applies in general terms to land within the Act except that expressly excluded by the same Act, namely, land already comprised in a scheme under the Act of 1932. When the Minister determines any such scheme, then the land is at once brought within the ambit of s. 31 of the Act of 1947. Until such determination, it is governed only by the scheme, and the regulations of 1948 do not affect it. Accordingly, I would allow the appeals with the usual consequences.

**LORD GODDARD, C.J.:** I do not pretend that I have found this case easy of decision, but I have come to the conclusion that the decision of the appeal committee of quarter sessions was right, and generally I agree with the judgment of McNAIR, J. In view of the provisions of s. 31 of the Act of 1947, and more especially of sub-s. (5), it is difficult to understand the provisions of sched. X, para. 7, relating to advertisements, and still more why the Minister has not after the lapse of the period of grace granted by the sub-section exercised his power of ending the 1932 scheme so far, at any rate, as it affects advertisements. I share the doubt which I understand McNAIR, J., feels whether it was intended that the paragraph in the schedule to which I have referred should preserve s. 47 of the Act of 1932, but, as counsel on either side presented their arguments on the basis that it is preserved at least inferentially, I will assume that it is still in force. That section, however, deals with the powers of a responsible authority, which is a different body from a local planning authority. The former were the respondents acting under powers given to them by the Act; the latter is the county council which, however, delegates its powers to the respondents who serve the enforcement notices as agents for the county council. It appears to me to be a somewhat unfortunate complication that the same body can act in regard to advertisements in two different capacities, and that, if they serve notices in the capacity of principals, certain results as to appeal follow, while, if they serve them in pursuance of delegated powers, other consequences ensue, especially as it does not appear that the county council had intervened and actually directed the notices in this case to be served. But the fact remains that the regulations under which these notices were served were made under the Act of 1947 and conferred powers, not on a responsible authority under the Act of 1932, but on the new local planning authority created by the Act of 1947. Then, when it is seen that by s. 31 (5) of the Act of 1947 a special provision is made as to existing advertisements, which has been carried into effect by reg. 7 of the regulations of 1948, I find it impossible to hold, despite the provisions of sched. X, that those regulations are not effective with regard to advertisements which existed when they were made. Let it be conceded that the

respondents might have acted under their powers as a responsible authority; in this case they have served the notice as the delegates of the local planning authority. These Acts are complicated enough in all conscience, and, if this case comes to the attention of the Minister, it is to be hoped that he will exercise his powers to tidy up what, whichever view ultimately prevails, is an untidy situation. I would dismiss the appeals.

*Appeals dismissed.*

Solicitors: *Hall, Brydon, Egerton & Nicholas* (for the appellants); *Leonard Worden*, town clerk, Hendon (for the respondents).

T.R.F.B.

### COURT OF APPEAL

(SINGLETON, DENNING AND HODSON, L.JJ.)

Nov. 17, 1952

BARTHOLOMEW v. BARTHOLOMEW

*Divorce—Desertion—Constructive desertion—Wife dirty in her person and the matrimonial home—No inference of intention to drive husband away.*

In December, 1945, the husband returned from war service and complained of the dirty condition in which the wife was keeping herself, the matrimonial home, and the children, and in March, 1946, he left, telling the wife that, if she failed to effect an improvement, he would not return. He complained that she failed to improve the conditions, and he refused to return to her. On a petition by him for divorce on the ground of constructive desertion,

HELD: the fact that a wife was dirty in her person and her home was not of necessity evidence which showed that she wished to bring the matrimonial consortium to an end; she might be dirty because she was lazy or lacked energy; the conduct of the wife in the present case was not of such a grave and convincing character as to justify an inference of an intention by her to drive the husband away from the matrimonial home; and, therefore, she was not guilty of constructive desertion.

Dictum of LORD GREENE, M.R., in *Buchler v. Buchler* (1947) (111 J.P. 179) applied. *Winnan v. Winnan* ([1948] 2 All E.R. 862), explained and distinguished.

APPEAL by the wife from an order of Mr. Commissioner GRAZEBROOK, Q.C., dated July 10, 1952, granting a decree nisi of divorce to the husband on the ground of desertion by the wife.

The husband alleged that he was forced to leave the matrimonial home owing to the dirty condition of the house, which, in spite of complaints by him, the wife failed to remedy. The commissioner held that the wife's conduct amounted to expulsion of the husband in circumstances amounting to desertion by her.

*J. C. Mortimer* for the wife.

*R. B. Willis* for the husband.

SINGLETON, L.J.: I am of opinion that this appeal should be allowed and that the decree granted to the husband by the learned commissioner should be set aside.

On Mar. 18, 1946, the husband left the matrimonial home because of the dirty condition of the house and children. He told his wife that he would be away for a fortnight, that she should see if she could clean up the house, and that if she did not do so he would stay away. He told the commissioner that he went back to the house on several occasions to take money, and found that

she had not improved the condition of the house, and so he ceased to go back to it and had not lived with his wife since Mar. 18, 1946. On Aug. 17, 1951, he petitioned for a decree of dissolution of his marriage alleging that his wife had deserted him without cause for a period of at least three years immediately preceding the presentation of the petition, and the particulars which he gave were:

"The petitioner discovered on his return on leave from H.M. Forces at Christmas, 1945, that the respondent had allowed the three younger children, the matrimonial home, and herself to get into a deplorable and filthy condition. When asked for an explanation the respondent said she could not bother. The house was insanitary, there were piles of dirty clothes about. The respondent smelt and could not remember when last she had had a bath. She prepared only a minimum of food and that out of tins. The petitioner himself did his best to clean up the house, but the respondent refused to make any effort. The petitioner further warned the respondent that, if she did not mend her ways, he could no longer live with her as conditions such as that were intolerable. The respondent did not mend her ways, so that the petitioner, unable any longer to endure the filth, squalor, and stench at the said matrimonial home, left the same on or about Mar. 18, 1946, since when the parties have lived separate and apart."

The wife put in an answer denying desertion on her part, and asking that she might be granted a decree on the ground of desertion by the husband.

To establish a right to a decree on the ground of constructive desertion it is necessary, it has been said time and again, to prove an actual intention to bring the matrimonial consortium to an end. Although the intention can be inferred from the circumstances, no such inference can be drawn unless the conduct relied on is of a grave and convincing character, equivalent to driving the other spouse away.

In *Buchler v. Buchler* (1) LORD GREENE, M.R. said:

"In constructive desertion the spouse charged must be shown to have been guilty of conduct equivalent to 'driving the other spouse away': per BUCKNILL, J., in *Boyd v. Boyd* (2) ([1938] 4 All E.R. 181 at p. 183); from the matrimonial home and to have done so with the intention of bringing the matrimonial consortium to an end. In each case the intention may, of course, be inferred if the circumstances are such as to justify the inference."

Later, the Master of the Rolls said:

"But, as I have already said, in cases of alleged constructive desertion it is essential to examine the actual facts to see whether the conduct of the spouse who is to blame can fairly and clearly be said to have crossed the borderline which divides blameworthy conduct causing unhappiness to the other spouse from conduct equivalent to expulsion from the matrimonial home."

Counsel for the husband submitted that in the present case there was conduct which ought to be regarded as equivalent to expulsion from the matrimonial home, and that the wife ought to be presumed to intend the natural consequences of her acts. If she kept the house in this filthy condition and would

(1) 111 J.P. 179; [1947] 1 All E.R. 319; [1947] P. 25.

(2) 102 J.P. 525; [1938] 4 All E.R. 181.

not clean it up after her husband's requests, it must be presumed that she intended to get rid of the husband.

In *Buchler v. Buchler* (1) LORD GREENE, M.R., further said:

"On a careful consideration of the case and a study of the whole of the evidence I am forced to the conclusion that the facts relied on were not of sufficient gravity to justify a finding that the husband deserted his wife. That they caused her intense unhappiness I have no doubt, but they were not, in my opinion, such as to justify her in treating them as a dismissal from the consortium although the husband, I agree, behaved to his wife in a manner in which no decent man ought to have behaved. If I am right in this, she could not concert them into such a justification by announcing her intention of leaving her husband if he did not change his conduct. If conduct is not a justification for one spouse to leave another, it cannot be made so by threats of this kind. Moreover, if the conduct in question is in its nature insufficient, a statement that, if she did not like it she could go, even if taken at its face value, could not, in my opinion, give to that conduct the character of desertion in fact."

In *Buchler v. Buchler* (1) this court approved what BUCKNILL, J., had said in *Boyd v. Boyd* (2), and, if further authority be needed, it is found in the judgment of DENNING, L.J., in *Hosegood v. Hosegood* (3), a judgment to which BUCKNILL, L.J., was a party, though BUCKNILL, L.J., did not repeat what he had said in *Boyd v. Boyd* (2).

We are asked to say that on the facts a case of constructive desertion is made out. I cannot see it. I do not agree with the conclusion drawn by the commissioner that the conduct of the wife amounted to expulsion of her husband in such circumstances as to amount to desertion of her husband by her. The evidence showed that she had a filthy house, and let it be said she might have done a good deal more to clean it up. I think the husband might have done something more to help her, and I cannot help thinking that he would not have left the children there if it had been as bad as he said. The fact that a wife is lazy and is dirty is not of necessity something which shows she is determined to get rid of her husband. She may be dirty because she is lazy or lacks energy. In my view, on the facts there is nothing on which it can be said that the husband has proved a case of constructive desertion. For that reason I consider that the appeal of the wife ought to be allowed, and the decree granted to the husband should be set aside, and I gather it follows from what has been said by the learned counsel, that, if that be so, the wife herself is entitled to a decree on the ground of desertion.

DENNING, L.J.: I agree. On the findings of the commissioner the wife was a lazy and dirty woman who did not keep the house or the children in a clean and proper state, so much so that on that account the husband left the house. That is not sufficient to make the wife guilty of constructive desertion. The essential element of intention is wanting. The wife had no wish that the husband should leave. There is no evidence that the wife intended to bring the matrimonial consortium to an end, and there is no ground for inferring any such intention. Without such intention constructive desertion cannot be found.

The law about constructive desertion was laid down by BUCKNILL, J., in 1938 in *Boyd v. Boyd* (2), in terms which were quoted with approval by LORD

(1) 111 J.P. 179; [1947] 1 All E.R. 319; [1947] P. 25.

(2) 102 J.P. 525; [1938] 4 All E.R. 181.

(3) (1950), 66 (pt. 1) T.L.R. 735.



GREENE, M.R., in *Buchler v. Buchler* (1), in the passage my Lord has read, and the judgment of BUCKNILL, J., was explicitly approved by this court in *Hosegood v. Hosegood* (2). The judgments in *Hosegood v. Hosegood* (2) were considered judgments, and I know that BUCKNILL, L.J., agreed with what I said about the nature of constructive desertion. *Winnan v. Winnan* (3), in which the wife kept a large number of cats in the matrimonial home, must have depended on special evidence available to show that she intended to bring the matrimonial consortium to an end in that she preferred the cats to her husband. In the present case I see no evidence, and no ground for inferring, that the wife intended to bring the matrimonial consortium to an end. The real thing for the husband to have done would have been to buckle to himself and seen that the house and the children were kept in proper order. Instead of doing that, he left the house and his children, and was himself the deserter. Accordingly, I agree that the appeal should be allowed.

HODSON, L.J.: I also agree. In my judgment, the wife's conduct did not speak for itself in such a way that it followed therefrom that she must have intended to drive the husband out. So far as express evidence of intention is concerned, the evidence is all the other way. So far as evidence of intention is concerned, the wife's intention would appear to be the opposite of that of a person who was meaning to drive her husband away, or to keep him away after he had gone.

I think the learned commissioner was impressed by *Winnan v. Winnan* (3), in which it was held that the wife's conduct in preferring cats to her husband amounted to constructive desertion by her. That, on the face of it, does not look as if it was a very impressive case of constructive desertion. The facts in that case are very sparsely reported, and the report is directed in the main to another subject altogether. It appears, however, that the decision as to constructive desertion was essential to the determination of that case, and to that extent, of course, the report is of relevant authority. The facts appear to show that the wife had been guilty of cruelty to her husband in the past (concessions seem to have been made by counsel for the wife in that connection), and, so far as the cats were concerned, the animals seem to have been extraordinarily numerous and to have turned the house into a sort of "zoo", the wife having expressed her preference for the cats as against her husband. There was, therefore, some evidence of an intention to drive him away. I think that that case can be distinguished from the present case, and that the facts here could not properly be held to be such as to constitute what may be described as acts of expulsion which might be said to speak for themselves so that the intention could readily be inferred from them. I agree, therefore, that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *H. H. H. Wiggett* (for the wife); *Gush, Phillips, Walters & Williams*, agents for *Knocker & Foskett*, Sevenoaks (for the husband).

G.F.L.B.

(1) 111 J.P. 179; [1947] 1 All E.R. 319; [1947] P. 25.

(2) (1950), 66 (pt. 1) T.L.R. 735.

(3) [1948] 2 All E.R. 862; [1949] P. 174.

## CHANCERY DIVISION

(DANCKWERTS, J.)

Nov. 28, 1952

## GILLINGHAM CORPORATION v. KENT COUNTY COUNCIL

*Education—Transfer of property from "former authority" to county education authority—"Former authority"—Dispute whether property liable to transfer—Question for determination by Minister—Education Act, 1944 (7 & 8 Geo. 6, c. 31), s. 6 (3), s. 96 (2), s. 114 (1).*

Under the Education Act, 1921, s. 3 (1) (b), the council of the plaintiff corporation, being the council of a non-county borough with a population of over ten thousand according to the census of 1901, was the local education authority for the purpose of elementary education, and, under s. 3 (2), the county council was the local education authority for the purposes of higher education. In 1937 the corporation leased the G. technical institute to the county council for the purposes of higher education. Under the Education Act, 1944, s. 6 (1) (Part II of which Act came into operation on Apr. 1, 1945), the county council became the local education authority for the county, and by s. 6 (3) all property previously held and used for educational purposes under the Education Acts, 1921 to 1939, was to be transferred to the county council. The corporation having issued a writ against the county council claiming a declaration that the G. technical institute had not been so transferred, the county council applied to set aside the service of the writ, contending that under s. 96 (2) of the Act of 1944 the question was one for the determination of the Minister of Education.

**HELD:** the borough council was a "former authority" within the definition of that term in s. 114 (1) of the Act of 1944, and, as the question concerned the transference of property from a former authority, which, by s. 96 (2), was a question to be determined by the Minister, the court had no jurisdiction to entertain the action, and the writ must be set aside.

**MOTION** by the defendants, Kent County Council, applying for an order to set aside the service on them of a writ issued by the plaintiffs, Gillingham Corporation, and, alternatively, to stay the proceedings in the action commenced by the writ.

On Jan. 6, 1937, the plaintiffs granted to the defendants a lease of property, known as Gillingham Technical Institute, for the purposes of higher education. By the writ in the action commenced by them against the defendants they claimed a declaration that the property had not been transferred to the defendants by virtue of the Education Act, 1944, s. 6 (3). On their application to have the service of the writ set aside, the defendants contended that the court had no jurisdiction in the matter, as, under s. 96 (2) of the Act, the question was to be determined by the Minister of Education.

*Sir Andrew Clark, Q.C., and Wilfrid Hunt for the defendants.*

*Milner Holland, Q.C., and J. A. Armstrong for the plaintiffs.*

**DANCKWERTS, J.:** This is an application by Kent County Council to set aside the service of a writ issued against them by Gillingham Corporation, and, alternatively, to stay proceedings in the action begun by the writ.

The dispute concerns the vesting of property for the purposes of the Education Act, 1944. Section 6 (1) of the Act provides:

"Subject to the provisions of Part I of sched. I to this Act, the local education authority for each county shall be the council of the county, and the local education authority for each county borough shall be the council of the county borough."

Gillingham is not a county borough, and, consequently, there is no doubt that

for the present purpose the county council are the local education authority for the purposes of the Education Act, 1944. Section 6 (3) provides:

"All property which immediately before the date of the commencement of this Part of this Act was held by the council of any county district solely or mainly for the purposes of any functions exercisable by them under the Education Acts, 1921 to 1939, and all rights and liabilities, whether vested or contingent, to which any such council were entitled or subject immediately before the said date by reason of the exercise of such functions shall, save as may be otherwise directed by the Minister under the powers conferred on him by this Act, be transferred by virtue of this section to the local education authority for the county in which the county district is situated."

By s. 119 Part II of the Act came into operation on Apr. 1, 1945. Section 1 of the Act shows that the Minister for all material purposes is the Minister of Education. Section 96 (1) provides:

"If upon the application of a former authority the Minister is satisfied with respect to any property which was immediately before the date of the commencement of Part II of this Act held by that authority for the purposes of functions exercisable by them under the Education Acts, 1921 to 1939, that, although the property was so held, it was held upon trust for purposes of such a nature that the transfer thereof to a local education authority would be inexpedient, the Minister may by order direct that the property shall be deemed not to have been transferred by virtue of s. 6 of this Act to the local education authority for the county in which the area of the former authority is situated."

That sub-section is not material for the question which I have to decide, but it shows that the Minister was given a power of exclusion. Section 96 (2), which is the material sub-section, provides:

"Where any question arises as to whether any officers, property, rights, or liabilities, have been transferred by virtue of this Act from a former authority to a local education authority, that question shall be determined by the Minister."

By s. 96 (4):

"Where it appears to the Minister that having regard to any such transfer it is desirable that any such adjustment as aforesaid (including any payment by either of the authorities concerned) should be made, he may, subject to any agreement made under [s. 96 (3)], by directions make provision for that adjustment."

Thus, the Minister is able to make adjustments in certain cases.

The present action has been begun by the corporation for a declaration that the property known as Gillingham Technical Institute has not been transferred to the county council by virtue of s. 6 (3) of the Act of 1944, and there is also a claim for rent which is dependent on the decision in respect of the declaration. It is contended by the county council that the action is started without any jurisdiction as, by s. 96 (2) of the Act, the dispute which is sought to be litigated in the action is a matter to be determined by the Minister of Education. Perhaps the decisive words in s. 96 (2) are "former authority", a definition of which appears in s. 114 (1) of the Act:

"'Former authority' means any authority which was a local education authority within the meaning of any enactment repealed by this Act or any previous Act."

The Education Act, 1902, s. 1, and the Education Act, 1921, s. 3, show that the borough council were the local education authority for the purposes of those Acts, but only as regards elementary education and not as regards higher education. They are the council of a non-county borough, with a population of over ten thousand according to the census of 1901, and, accordingly, by s. 3 (1) (b) of the Act of 1921 they were the local education authority for the purposes of elementary education. By s. 3 (2) of the Act of 1921:

"For the purposes of higher education—(a) the council of a county as respects their county; and (b) the council of a county borough as respects their borough; shall be the local education authority, but the councils of non-county boroughs and urban districts, though not local education authorities for higher education, shall have the powers as respects higher education given under this Act."

The Act of 1921 was repealed by s. 121 and sched. IX of the Act of 1944.

The Gillingham Technical Institute was not used by the borough council for elementary education, but was leased by them to the county council for the purposes of higher education, and, therefore, it is contended by the corporation that the borough council were not a local education authority in respect of the property and that the matter is not determinable by the Minister under s. 96 (2) of the Act of 1944. It is, however, plain that the borough council were a local education authority for some purposes. If the clear effect of s. 96 (2) is to refer the dispute to the decision of the Minister, there is authority that the jurisdiction of the court is ousted and is transferred to the tribunal provided for by the statute: see *Crisp v. Bunbury* (1), which was decided in 1832 and approved by the Court of Appeal in *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (2), per VAUGHAN WILLIAMS, L.J. There is no doubt that the principle has often been recognised, but it is argued on behalf of the borough council that I ought to have regard to the purpose of this statutory provision and the nature of the council with which it is concerned and that it cannot have been intended to give to the Minister power to decide what is really a question of the construction of s. 6 (3), and, therefore, a matter of law. But if I am satisfied on the precise terms of s. 96 (2) of the Act of 1944 that the question is referred to the Minister for decision, it seems to me that I have no choice in the matter.

It is plain that the dispute concerns property and whether or not that property has been transferred to the county council by s. 6 (3) of the Act of 1944. In my opinion, a local education authority for the purposes of the provisions of former Acts is "a former authority" for the purposes of the Act of 1944 even though under the former Acts the council was only a local education authority for certain purposes, and, therefore, the borough council is a "former authority" within the meaning of s. 96 (2) of the Act of 1944. It seems to me that the words of s. 96 (2) are perfectly plain and that this is a matter which is not open to consideration by this court because by that sub-section it must be referred to the decision of the Minister. Accordingly, it seems to me that this motion succeeds and that I should set aside the service of the writ.

*Order accordingly.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *W. L. Platts*, clerk of the county council, Maidstone (for the county council); *Wilkinson, Howlett & Moorhouse* (for the corporation).  
R.D.H.O.

(1) (1832), 8 Bing. 394; 131 E.R. 445.

(2) 68 J.P. 421, 424; [1904] 2 Ch. 123; on appeal, H.L., 69 J.P. 441; [1905] A.C. 421.



COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., HILBERY AND PARKER, JJ.)

Dec. 8, 1952

REG. v. YOUNG AND ANOTHER

*Criminal Law—Receiving stolen goods—Proof of larceny.*

The decision in *Cohen v. March* [1951] 2 T.L.R. 402 depended entirely on its own facts, and did not lay down any principle of law.

APPEAL against conviction.

The appellants, Henry Stephen Young, and Ronald William Spiers, were convicted at the West Kent Quarter Sessions of receiving metal and were sentenced to nine months' imprisonment and three years' corrective training, respectively. The ground of the appeal was that, the property not having been identified and Young having given an explanation of where he found it, there was no evidence on which the jury could find that the property was stolen.

*Dorothy Dix* for the appellants.

*R. I. S. Baz* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellants were convicted at the West Kent Quarter Sessions of receiving stolen metal. There were four counts, two of larceny and two of receiving against each of them. The first two counts had reference to 143 lb. of brass and phosphor bronze. The second two counts related to some lead hammers and a brass bearing bush, which were identified as the property of a particular firm, and no point arises about them. On the first two counts it is suggested that there was no evidence against the appellants because the property was not identified.

The police went to the premises of the appellant, Spiers, and said they were looking for metal, which he denied having. They then found this metal hidden away and Spiers said, which very likely was true, that he had paid the appellant Young £5 for it the day before. When Young was seen, he said that he had picked the metal from a dump. At the trial he went into the box and swore that it had not been stolen, but it has been laid down over and over again that the circumstances of a case may justify a jury in coming to the conclusion that there is a larceny or receiving of the property. In the present case the metal was new, untarnished, and recently milled, and there was a considerable quantity of it. In those circumstances the jury found that it was stolen metal, but it is said that we ought to quash the conviction on the ground that there was no evidence. Reliance is placed on *Cohen v. March* (1), which was a case in which there had been a charge in respect of some stolen razor blades and the court came to the conclusion that some untruth which had been told to the policeman when he first interviewed the prisoner did not justify an inference that the goods were stolen. I expressly said in giving judgment that the case depended entirely on its own facts. I said:

"I suppose there might be a case—circumstances differ so infinitely—in which a person makes a statement on which a jury would be justified in finding that he did know that the goods were stolen."

The court was not there intending to lay down any principle of law. They were merely dealing with the particular facts of the case, and they came to the conclusion that the evidence did not justify the jury in finding that the goods were stolen.

(1) [1951] 2 T.L.R. 402, 404.

In the present case again they so found, and, in the opinion of the court, there was evidence on which they could do so. There was a very careful summing-up by the deputy chairman, and the jury, having seen the metal and heard the appellant, Young, tell a story on oath which they rejected, it is not surprising that they came to the conclusion that he had stolen the property. It is one thing to make some answer to a policeman, it is quite another to give evidence on oath at the trial, and, if the jury found that they disbelieved Young on oath, they might think he had a good reason for telling a perjured story and they could find him guilty of stealing. There was ample evidence from the circumstances in which the goods were found to justify the conviction of Spiers of receiving the goods knowing them to have been stolen.

The same points have been made on behalf of Young as Spiers, and, in the opinion of the court, there is no ground for interfering with the conviction. We are not laying down any point of law in this case.

*Appeal dismissed.*

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellants); *Solicitor, Metropolitan Police* (for the Crown).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(HALLETT, J.)

Dec. 11, 12, 1952

#### EAST MIDLANDS GAS BOARD *v.* DONCASTER CORPORATION

*Gas—Nationalisation—Undertaking formerly maintained by local authority—Recovery of sums transferred from gas undertaking accounts to other accounts—Amounts "debited . . . in the accounts of the gas undertaking . . . and credited . . . in . . . other account"—Expenses and receipts of undertaking to be paid out of and into general rate fund—Authority directed to "show under a separate heading or division" accounts of gas undertaking—Transfers from gas undertaking section to general rate fund—Liability of authority to account to gas board for sums transferred—Finality of determination by Minister of Health—Doncaster Corporation Act, 1926 (16 and 17 Geo. 5, c. xxvii), s. 71, s. 72—Gas Act, 1948 (11 and 12 Geo. 6, c. 67), s. 37 (1), (2).*

On May 1, 1949, the gas undertaking of the defendant corporation was vested in the plaintiff gas board under s. 17 (1) of the Gas Act, 1948. On Aug. 23, 1949, the gas board claimed the payment to them by the corporation of two sums transferred in the accounts of the corporation on Mar. 31, 1948, as follows: (i) £8,487 2s. 9d., the balance of profit then appearing in the net revenue account of the gas undertaking, to their general rate fund account, and (ii) £2,144 0s. 3d. a refund of excess profits tax then standing in the "E.P.T. post-war refund suspense account" of the gas undertaking, to the corresponding account of the corporation's water undertaking. The corporation's abstract of accounts for 1947-48 included a section described as: "Gas works account" and headed: "General rate fund (gas works section)", which contained a revenue account. There were also a gas section ledger and a gas section cash book. The gas board claimed that the amounts were due under s. 37 (1) of the Act of 1948, having been "debited . . . in the accounts of the gas undertaking" after Feb. 10, 1948, and "credited . . . in any other account of the authority" without the approval of the Minister of Health. The corporation denied that the amounts had been so debited and credited, and said that the accounts related to various provisions and sections of the one fund of the corporation, the general rate fund, by virtue of s. 71 of the Doncaster Corporation Act, 1926 (which provided: ". . . all money received by the corporation on account of the revenue

of the [gas undertaking] shall be carried to and shall form part of the borough fund and all payments . . . made and incurred in respect of [the undertakings] shall be paid out of that fund", and the Local Government Act, 1933, s. 185, (which provided: "(1) All receipts of the council of a borough . . . shall be carried to the general rate fund of the borough, and all liabilities falling to be discharged by the council shall be discharged out of that fund. (2) An account, called the 'general rate fund account', shall be kept of all receipts carried to, and payments made out of, the general rate fund.") By s. 72 of the Act of 1926 the corporation were required to keep their accounts so, as "regards the revenue account to show under a separate heading or division in respect of" their gas undertaking all receipts and payments and expenses of the undertaking. After submission of the cases for the two parties under s. 37 (2) of the Gas Act, 1948, the Minister of Health, on July 6, 1950, upheld the claim. In an action by the gas board to recover the two sums,

HELD: (i) the Minister of Health was required by s. 37 (2) of the Act of 1948 to determine claims under that section, and, as the gas board's claim against the corporation was such a claim, made (as required) within twelve months of the vesting date under the Act, and not settled by agreement, and, as it had been so determined, the court had no jurisdiction to determine that it was not a valid claim.

*Cripp v. Bunbury* (1832) (8 Bing. 394) and dictum of VAUGHAN WILLIAMS, L.J., in *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (1905) (68 J.P. 424), applied.

(ii) in any event, the two sums had been debited in the accounts of the gas undertaking and credited in other accounts of the corporation without the approval of the Minister within the meaning of s. 37 (1) of the Act of 1948, and were, therefore, payable to the gas board, since, notwithstanding the provisions relating to payments into and out of the general rate fund, the revenue account of the gas undertaking, the general rate fund account, and the two suspense accounts were separate accounts, and not merely sections of the general rate fund.

ACTION for the payment of two sums alleged to be due to the plaintiffs, the East Midlands Gas Board, by the defendants, Doncaster Corporation, under s. 37 (1) and (2) of the Gas Act, 1948.

Under the Gas Act, 1948, s. 17 (1), the gas undertaking of the defendant corporation was vested in the plaintiff gas board on May 1, 1949 (see Gas (Vesting Date) Order, 1949, (S.I., 1949, No. 392). Within twelve months of that date, on Aug. 23, 1949, in compliance with the provisions of s. 37 (2) of the Act, the board submitted to the corporation a claim for the payment of two sums, alleged to be due to them under that sub-section. The corporation replied on Sept. 2, and, after correspondence between the parties, they put their cases before the Minister of Health, the board in a document of Mar. 15, 1950, and the corporation in a document forwarded with a letter of June 6, 1950. On July 6, 1950, the Minister upheld the claim of the board. The board sought in the action to recover the sums, claiming that the corporation's liability was finally established by the Minister's determination. The corporation denied that their liability was concluded by the determination, and contended that the claim ought to have been disallowed.

The claim arose out of the following two transfers made in the accounts of the corporation: (i) On Mar. 31, 1948, the corporation transferred £8,487 2s. 9d., the credit balance of net profit in the net revenue account of the gas undertaking at that date to the general rate fund account, debiting the gas account with that amount and crediting in the general rate fund account a larger amount which included the £8,487; (ii) on the same date the corporation transferred £2,144 0s. 3d. standing in the credit of an account in the gas accounts called "E.P.T. post-war refund suspense account" to the water account, debiting the suspense account in the gas accounts with that amount and crediting the "E.P.T. post-war refund suspense account" of the general rate fund (water-works section) of the accounts with a larger sum which included the £2,144. The £2,144 represented the part apportioned to the gas undertaking of two refunds of excess profits tax in respect of the corporation's revenue producing

undertakings—an actual cash payment, and a deduction from a liability of the corporation to the Inland Revenue. The Minister of Health had not approved the transfers.

The board contended that the corporation were liable to pay to them the two sums by virtue of s. 37 (1) of the Gas Act, 1948, since they were amounts "without the approval of the Minister of Health, debited . . . in the accounts of the gas undertaking" after Feb. 10, 1948, and "credited . . . in [another] account of the authority" under that sub-section. The corporation contended that the revenue of the gas undertaking was required by the Doncaster Corporation Act, 1926, s. 71, and by the Local Government Act, 1933, s. 185 (1), to be transferred to and to form part of, the borough fund, out of which all payments and expenses made and incurred in respect of the undertaking were required to be paid; that the general rate fund was the sole fund of the corporation apart from the reserve fund; and the accounts related to various provisions and sections of the general rate fund. They submitted, therefore, that the alleged debiting and crediting of separate accounts had not taken place.

*Sir Frank Soskice, Q.C., and J. P. Ashworth for the plaintiff gas board.*

*Capewell, Q.C., F. N. Keen and W. Sugden for the defendant corporation.*

**HALLETT, J.:** This is a claim by the East Midlands Gas Board against the Doncaster Corporation for two sums, £8,487 2s. 9d. and £2,144 0s. 3d. respectively. The claim is made under and by virtue of s. 37 of the Gas Act, 1948. That Act was passed by Parliament for the purpose of compulsorily acquiring the gas undertakings of the country, whether owned by private companies or by local authorities, and vesting them in certain gas boards, of which the plaintiffs are one. At the time when the Act was introduced the vesting date remained to be fixed, and it was ultimately fixed as May 1, 1949, by the Gas (Vesting Date) Order, 1949 (S.I. 1949, No. 392). The Bill had its first reading on Jan. 23, 1948, and that is, no doubt, the reason why that date appears in s. 36 of the Act, to which I shall presently refer. When the Bill was first introduced it did not contain s. 37, but on the second reading, which took place on Feb. 10, 1948, the Minister of Fuel and Power intimated that he intended to introduce certain further provisions with respect to the transfer of assets before the vesting date, and that was the reason why the date, Feb. 10, 1948, ultimately appeared in s. 37.

It is reasonably clear that, if the new area gas boards were going to be possessed on the vesting date of the assets of the former gas undertakings, those who were interested in the former gas undertakings might seek before the vesting date to put some of their assets out of the reach of the gas boards, and one can conceive that that would be the more likely in the case of local authorities, because, whereas companies owning gas undertakings were to receive compensation, local authorities were to have no compensation for losing what, in many cases, may have been very valuable assets, except that there was a lump sum made available for compensation in respect of severance. The danger that, before the assets vested under s. 37, some of them might have been put out of the reach of the gas boards was appreciated by Parliament, and s. 33 to s. 38 of the Act are printed under the heading:

"Control of dividends and interest and safeguarding of assets pending transfer."

The heading has no statutory authority, but it does usefully summarise the objects obviously sought to be attained by s. 33 to s. 38. Section 37 has two



sub-sections, and there arise, therefore, in this action two points to be determined. Section 37 (1) lays down that in certain events the local authority shall be liable to pay certain amounts to the appropriate board with an exception which is immaterial for the purposes of the present case. The first point taken by counsel for the gas board is that, on a true construction of s. 37 (1), and on the true view of the facts here, there has arisen on the part of the defendant corporation a liability to pay to the gas board the two sums claimed in this action.

Section 37 (2) reads:

"Any claim under this section by the appropriate board against the local authority shall be made before the expiration of a period of twelve months beginning with the vesting date, and if so made and not settled by agreement, shall be determined by the Minister of Health."

The second point taken by counsel for the gas board is that, whether the claim was or was not a valid claim under the provisions of s. 37 (1) having regard to the facts of this case, by s. 37 (2) the validity of the claim is expressly referred by the legislature to the Minister of Health for determination, and, accordingly, on well-known principles and in the light of abundant authority, this court has no jurisdiction to decide whether or not the claim is valid, because its validity was considered by the Minister of Health who determined the question adversely to the defendant corporation.

I do not think that the law is in any doubt: see *Crisp v. Bunbury* (1), decided in 1832 and referred to with approval by VAUGHAN WILLIAMS, L.J. (68 J.P. 424), in *Joseph Crosfield & Sons, Ltd. v. Manchester Ship Canal Co.* (2). The decision in those cases can be summarised as follows. If two persons agree that any dispute which may arise between them in respect of any matter shall be referred to the determination of a third person, that agreement will not oust the jurisdiction of the court, but, since the court attaches importance to the sanctity of contract, the court will, generally speaking, in the exercise of its discretion and in aid of that sanctity of contract, stay an action which is brought in contravention of or non-compliance with what has been agreed. That is what happens in the usual case where there is what is commonly called an arbitration clause and one party, notwithstanding the arbitration clause, seeks to resort to the courts. On the other hand, where the legislature has thought it proper to lay down that the determination of a certain question should be made by some authority other than the courts, the courts have no jurisdiction to override Parliament and no jurisdiction to determine that which Parliament has said shall be determined by some other person or body. If the other person or body, being in the nature of an inferior tribunal, proceeds to exceed its authority or not to exercise it properly, then, in certain appropriate cases, the Queen's Bench Division of the High Court of Justice, acting through the Divisional Court, can restrain the person or body so acting by processes which are well-known, but, apart from that authority which can be exercised over inferior tribunals, the court cannot proceed as an appellate authority to review, and, if it thinks right, overrule, the determination of a person or body to whom Parliament has entrusted the determination of the particular problem.

In regard to the two points raised by counsel for the gas board, I think that the logical order in which to deal with them is the inverse of that in which I have stated how they arise, and I shall deal first with the second point, viz., that, whether or not the claim made by the gas board be a valid claim, its

(1) (1832), 8 Bing. 394.

(2) 68 J.P. 421; [1904] 2 Ch. 123; *affd.*, H.L., 69 J.P. 441; [1905] A.C. 421.

validity has been determined in favour of the board by the Minister of Health, and this court has no jurisdiction to investigate its validity. [Dealing with the requirements of s. 37 (2) of the Act of 1948, HIS LORDSHIP reviewed the facts in regard to the claim and found that it was made by the appropriate board against the local authority, within the period required by s. 37 (2), and that, not having been settled by agreement, it was determined by the Minister of Health, and he continued:] It seems to me, therefore, that the only point which remains, as regards the position under s. 37 (2), is whether it was a claim under the section. It seems to me that it clearly was. According to the defendant corporation, it was a claim which, having regard to the terms of s. 37 and to the facts of the case, ought to have been disallowed. To put it in another way, it was not a valid claim. But that it was a claim under s. 37 by the appropriate board against the local authority and made before the expiration of twelve months beginning with the vesting date seems to me to be beyond doubt, and that it was not settled by agreement is also beyond doubt. In those circumstances it was a claim which fell to be determined by the Minister of Health, and, since Parliament has said that it "shall be determined by the Minister of Health", in my judgment, on well settled principles, it is not a claim which this court has any jurisdiction to determine. The Minister of Health having determined that it was a good claim, this court has no authority to say that, in its opinion, it is a bad claim and to give judgment for the defendant corporation accordingly.

If I am right about that, it seems to be an end of this action, but, as the question whether this was a valid claim has been argued by counsel and in case it should be held elsewhere that I am wrong on the first point, I shall deal also with the other point. Before the Doncaster Corporation Act, 1926, certain enactments dealt with the application of the revenue from the corporation's revenue-producing undertakings, and, in particular, from the water, gas, light railways, and electricity undertakings. The application of the revenue of the gas undertaking was dealt with in the Doncaster Corporation Act, 1904, by s. 177 of which the defendant corporation were bound to

"... apply all money received by them on account of revenue in respect of their gas undertaking in manner and in the order following (that is to say) . . ."

The section concluded:

"And the corporation shall carry to the borough fund so much of any balance remaining in any year of the income of the undertaking (including the interest on the reserve fund . . .) as may in the opinion of the corporation not be required for carrying on the undertaking and paying the current expenses connected therewith."

Thus, under s. 177 of the Act of 1904 the defendant corporation were under an obligation to carry to the borough fund, which was what would now be called the general rate fund, any balance remaining in any year of the income of the undertaking which was not required by the corporation for carrying on the undertaking and paying the current expenses connected therewith. By the Doncaster Corporation Act, 1926, s. 79, the enactments dealing with the application of revenue from the revenue-producing undertakings, including s. 177 of the Act of 1904, were repealed, and by s. 71 of the Act of 1926 it was laid down that as from a certain date

"... all money received by the corporation on account of the revenue

of the following undertakings (namely) [the section then names six revenue-producing undertakings of which the third is the gas undertaking] shall be carried to and shall form part of the borough fund and all payments and expenses made and incurred in respect of those undertakings shall be paid out of that fund."

The Local Government Act, 1933, contains substantially similar provisions, in s. 185 as regards borough councils, and in s. 188 as regards urban district councils. By s. 185 (1):

"All receipts of the council of a borough . . . shall be carried to the general rate fund of the borough, and all liabilities falling to be discharged by the council shall be discharged out of that fund. (2) An account, called the 'general rate fund account,' shall be kept of all receipts carried to, and payments made out of, the general rate fund."

Section 72 of the Doncaster Corporation Act, 1926, however, provides:

"*Separate accounts in respect of certain undertakings* . . . the corporation shall keep their accounts so as . . . as regards the revenue account to show under a separate heading or division in respect of each of the following undertakings"

all the receipts and payments and expenses in respect of the undertakings, being the light railways, water, gas, electricity, market, and baths undertakings. The section also lays down what those accounts shall contain. The object of keeping such separate accounts is, I think, apparent, and so appeared to me before examination of the recent cases. The object of such sections was considered by LORD GREENE, M.R. (106 J.P. 220), in *Allchin v. Coulthard* (1) and by WYNN PARRY, J., in *North-Eastern Gas Board v. Leeds Corpn.* (2), where he quoted (116 J.P. 487) the passage from LORD GREENE's judgment to which I have referred. Section 73 of the Doncaster Corporation Act, 1926, deals with the disposal of surplus revenue of the electricity undertaking in reduction of electricity charges, but apart from that provision there is no provision limiting the way in which the corporation deal with the revenue from their revenue-producing undertakings. Separate accounts of these undertakings, I think, had to be kept, even apart from s. 72 of the Act, in order to satisfy other obligations of the corporation. For instance, as regards gas, accounts had to be furnished by the corporation to the Board of Trade as to undertakings under the Gas Regulation Act, 1920, s. 15 (1), and, as regards the light railways undertaking, accounts had to be furnished to the Minister of Transport under s. 78 of the Doncaster Corporation Act, 1926. That, then, is the position as to their obligation to keep separate accounts.

The corporation did keep separate accounts of their various revenue-producing undertakings and also of other departments of their activities. The table of contents of the abstract of the treasurer's account for the year ended Mar. 31, 1948, vol. 1, starts off with "Gas works account", and goes on with water works account, electricity account, and so forth. The first section of the book is described as dealing with the "General rate fund (gas works section)". Then there are the revenue account and certain other accounts dealing with the gas works undertaking. I think the heading, "General rate fund (gas works section)", is used because of s. 71 of the Act of 1926, and it would probably have been necessary because of s. 185 (1) of the Local Government Act, 1933. But there is certainly a separate section dealing with the accounts

(1) 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

(2) 68 J.P. 421; [1904] 2 Ch. 123; *affd.*, H.L., 69 J.P. 441; [1905] A.C. 421.

of the gas works undertaking, and it appears that originally the section was physically separate for the purpose of its submission to the appropriate committee of the corporation for approval. So all through this volume there are these different sections dealing with different undertakings, some of them revenue-producing and some not revenue-producing, and at p. 258 there is the aggregate balance sheet as at Mar. 31, 1948. On p. 258 on the liabilities side of the account, and on p. 259, the property, assets and outlay side, the heading in the left-hand column is "Account or fund. Gas, water, electricity, trackless trolley", and so forth. To my mind, it is unarguable that there was not a separate gas account and also a separate general rate fund account. Counsel for the corporation has urged on me strongly, with the authority of *Allchin v. Coulthard* (1) and on the strength of s. 71 of the special Act of 1926 (and, as he would have submitted, on the strength of s. 185 of the general Act of 1933), that, apart from the reserve fund, which, I think, he would concede was in a special position, there is only one fund, viz., the general rate fund, and I would assume, without deciding it, that in that submission he is correct. But, whether there be only one fund or not, I am satisfied on the evidence that there was more than one account, and, in particular, that there was a gas account, as there was a water account and the general rate fund account. Among the defendant corporation's books of account there were also a gas section ledger and a gas section cash book, a waterworks ledger and a waterworks cash book, and a general rate fund ledger and a general rate fund cash book.

With regard to what happened to the amounts with which I am concerned, in the net revenue account of the gas account for the year ending Mar. 31, 1948, there was a balance of net profit of £8,487 2s. 9d. That net profit was transferred to the general rate fund as shown by a cash book entry and forms part of the figure of £79,099 2s. 0d., trading surpluses account, in the abstract in the general rate fund summary revenue account as a contribution in aid of rates. The same thing appears also from the ledger and cash book entries relating to the gas undertaking and to the general rate fund. In other words, the £8,487 2s. 9d. is debited in the gas account and the same amount, though concealed in a larger amount, is credited in the general rate fund revenue account. The other item in dispute is somewhat more difficult to deal with, although I have come to the conclusion that there is no difference in principle which affects the matter. At some time before 1946 the defendant corporation had been compelled to pay excess profits tax in respect of their revenue-producing undertakings, and at the time with which I am concerned a refund of the tax had become payable. It seems to be agreed that the undertakings of the corporation, for the purpose both of the payment of excess profits tax and also of any refund becoming due, are considered together. Under the Finance (No. 2) Act, 1945, s. 39 (1) and s. 40 (1), no post-war refund was to be made to any person unless an undertaking was given that the net amount of the refund would be used in developing or re-equipping the trade or business and, until so used, would be so dealt with as to remain available for use, when required, in so developing or re-equipping the trade or business. The corporation received two amounts by way of refund of excess profits tax. The first was an actual cash payment. The second was recovered by way of deduction from a liability of the corporation to the inland revenue authorities. Those two different ways of receiving the refund have complicated the facts a little by splitting up the amount claimed by the gas board under the second head

(1) 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.



into two items, £1,012 4s. 5d. and £1,131 15s. 10d. The refunds were apportioned by the borough treasurer among the revenue-producing undertakings in the accounts of those undertakings. Without deciding it, as at present advised I am disposed to agree with the borough treasurer that he was bound to apportion those refunds by virtue of s. 75 of the Doncaster Corporation Act, 1926, though he said he would have done it in any event as the right thing to do, though Mr. Hill, a financial expert witness, disagreed. It is sufficient, however, that £2,144 0s. 3d. was in fact apportioned to the gas account and appears in the accounts of the gas section under the heading "E.P.T. post-war refund suspense account". For, perhaps, obvious reasons, since it had either to be spent on development, etc., or to be kept available for that purpose, and since that is, I imagine, the normal way of keeping a sum available for a future purpose, the total was put into a suspense account. On Mar. 31, 1948, that account was debited with £2,144 0s. 3d. in respect of a cash transfer to the water account. In the waterworks ledger and in the waterworks cash book it appears as: "To various accounts excess profits tax, post-war refunds, gas, £2,144 0s. 3d." So there is a debit in the gas account of that sum in respect of a transfer to the water account, and a credit in the water account in respect of that sum received from gas. The item is to be found under the general rate fund (waterworks section) of the accounts under "E.P.T. post-war refund suspense account" as: "Transferred from other trading undertakings, £11,837 10s. 3d." How that £11,837 10s. 3d. is made up is disclosed in the waterworks cash book and the water ledger, where it is shown that into that £11,837 10s. 3d. there enters £2,144 0s. 3d. from the gas account. The authority for that method of dealing with the items in the gas account is to be found recorded as I understand it, on the correspondence.

I have not found any case which directly assists me on this point. In *North-Eastern Gas Board v. Leeds Corpn.* (1), the transfer or dealing by the local authority with the sums there in question had taken place long before Feb. 10, 1948. As I understand it, the corporation there transferred the sums in question to their general rate fund in 1947. Accordingly, s. 37 of the Gas Act, 1948, had no relevance, but the gas board had to demonstrate, in the words of WYNN-PARRY, J. (116 J.P. 484),

"that the corporation had no power to perform these operations at the time when they did so."

For reasons given in his judgment, he came to the conclusion that in 1947 they had power to perform those operations and that, the moneys having as a result been merged in the general rate fund—"lost" was the word used by LORD GREENE, M.R., in *Allchin v. Coulthard* (2) (106 J.P. 220) the gas board could not disentangle them and claim them as assets of the gas undertaking vested in them under the vesting sections of the Act of 1948. If I have rightly summarised the substance of that case, it clearly is no help to me here. I assume, without deciding it, that, but for the passing of the Gas Act, 1948, and, in particular, but for the results of s. 37, the defendant corporation could have merged the two amounts now in question in the general rate fund, or, if so desired, as it actually did, have merged one of them in the general rate fund and the other in the accounts of the water undertaking. But I have to decide what is the effect on the liability of the corporation of s. 37 of the Act.

As I find no help in the cases I have mentioned, I must take the words of

(1) 116 J.P. 483; [1952] 2 All E.R. 326.

(2) 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

the section and see if there is any doubt about their meaning or their application to the present facts. Section 37 (1) provides:

"Where at any time after Feb. 10, 1948, a local authority have, without the approval of the Minister of Health, debited any amount in the accounts of the gas undertaking of the authority . . ."

There has been no dispute here that what the defendant corporation did with regard to the two sums in question, which has given rise to the present claim, was done after Feb. 10, 1948, and without the approval of the Minister of Health. In spite of the argument of counsel to the contrary I should have said it was obvious on the documents and books before me that the corporation debited both the amounts in question in the accounts of the gas undertaking of the authority on Mar. 31, 1948, one being in respect of a cash transfer to the general rate fund and the other in respect of a transfer to the water undertaking. I cannot see how there could be a clearer debiting of the two amounts in the accounts of the gas undertaking. Section 37 (1) provides that where a local authority have

"debited any amount in the accounts of the gas undertaking of the authority and credited that amount in any other account of the authority, the local authority shall be liable to pay that amount to the appropriate board",

with an exception which, as I have said, is immaterial. Here, again, in my view, there could not be a clearer crediting in other accounts of the defendant corporation.

When I look at the words of the section, it seems to me plain that in upholding the claim of the gas board against the corporation the Minister of Health was correct. It seems to me idle to discuss what might have been the result if the words of the section had been different from what they are. For instance, if there had been words referring to a transfer from one fund to another, the argument of counsel for the defendant corporation might well have prevailed that, having regard to the provisions of s. 71 of the private Act of 1926, and, maybe, also to the provisions of the Local Government Act, 1933, there is only one fund apart from a reserve fund, that that fund is the general rate fund, and that these accounts relate to various provisions and sections of that one fund. But Parliament chose to use very plain language, and the facts of this case seem to fall within the scope of that language without any doubt. For those reasons, I think that the plaintiff gas board should succeed on both grounds. First, I think there has been a determination by the Minister of Health in their favour on their disputed claim, and such determination has by statute been left to the Minister of Health and this court has no right to differ from his decision or to review it. Secondly, even if it were open to me to review the decision of the Minister of Health contrary to the view which I take, I have no doubt that the determination of the Minister of Health was in fact correct. There will be judgment for the plaintiffs for the amount claimed.

*Judgment for the plaintiff gas board.*

Solicitors: *Sherwood & Co.*, agents for *A. Gwynne Davies*, secretary and solicitor, East Midlands Gas Board, Leicester (for the plaintiff gas board); *Sharpe, Pritchard & Co.*, agents for *H. R. Wormald*, town clerk, Doncaster (for the defendant corporation).

F.A.A.

## COURT OF APPEAL

(SIR RAYMOND EVERSHED, M.R., DENNING and ROMER, L.JJ.)

December 2, 3, 4, 8, 9, 10, 12, 15, 1952

PRIDE OF DERBY AND DERBYSHIRE ANGLING ASSOCIATION, LTD.  
AND ANOTHER *v.* BRITISH CELANESE, LTD. AND OTHERS*Water and Watercourses—Pollution of river—Untreated sewage matter—Action by riparian owner and fishery owner against local authority—Rivers Pollution Prevention Act, 1876 (39 and 40 Vict., c. 75), s. 3—Derby Corporation Act, 1901 (1 Edw. 7, c. cclxvii), s. 109 (1), s. 113.**Injunction—Nuisance—Local authority—Licence needed for work necessary for compliance with injunction—Form of order.*

The first plaintiff, an angling association, was the owner or occupier of a fishery on the Rivers Derwent and Trent from below the confluence of the rivers to Borrowash Bridge on the Derwent, about seven miles above the confluence. The second plaintiff, the Earl of Harrington, was a riparian owner of a considerable stretch of both rivers. On the banks of the Derwent below Derby and above the plaintiffs' waters were works maintained by the defendants. Immediately after passing Derby the river was in a reasonably pure state and supported game fish, but before reaching Borrowash Bridge, owing to the activities of the defendants, it was polluted to such an extent that it was foul and black and contained little or no fish. The pollution was caused (a) by effluent consisting of sewage matter, insufficiently treated and discharged into the river from the sewage works of the second defendants, Derby Corporation, and (b) heated effluent, containing suspended organic matter, discharged into the river from the works of the first defendants, a company, which admitted liability. The damage and danger resulting from the pollution were aggravated by the rise in the temperature of the water caused by large quantities of heated effluent which were discharged into the river from the generating station of the third defendants, the British Electricity Authority, which had been set up and maintained under the powers conferred on their predecessor by the Derbyshire and Nottinghamshire Electric Power Acts, 1901 and 1929. The water which was discharged into the river from the works of the electricity authority had been extracted from the river. On Apr. 9, 1952, in an action by the plaintiffs, the judge granted a perpetual injunction restraining each of the defendants from causing or permitting any effluent to flow or pass from their respective premises into the River Derwent (a) so as sensibly to alter the quality (including the temperature) of the waters of the River Derwent or of the River Trent where they flowed past or over any part of the plaintiffs' premises, or (b) so as to interfere with the enjoyment by the plaintiffs, or either of them, of the right of fishing in any part of their waters. He further ordered that the operation of the injunction be suspended until Apr. 30, 1954. On appeal, the corporation contended, *inter alia*, (a) that, as the sewage works were authorised by the Derby Corporation Act, 1901, were completed in accordance with the Act, and were satisfactory when completed, if at a later date, owing to an increase of population, over which the corporation had no control, they functioned so as to cause a nuisance, this was merely non-feasance on the part of the corporation and the plaintiffs had no right of action against them, or, at most, merely a right to compensation; and (b) that, in any event, an injunction should not be granted against a local authority.

**HELD:** (i) section 109 (1) of the Derby Corporation Act, 1901, which authorised the corporation to construct and maintain their sewage works, contained an express prohibition, which was of general application, against the corporation operating the works so as to cause a nuisance; although s. 113 of the Act of 1901 empowered the corporation to divert brooks and streams and to use them when diverted for carrying sewage, the first proviso to the section stated that the corporation were not authorised to do anything in contravention of the Rivers Pollution Prevention Act, 1876, and under s. 3 of the Act of 1876 it was an offence to cause any solid or liquid sewage matter to fall or flow into any stream; the second proviso to s. 113 of the Act of 1901, whereby the corporation were to pay compensation for damage sustained by reason of the exercise of the powers in the section, did not apply, as a contravention of the Rivers Pollution (Prevention) Act, 1876, was not something done under the powers in the section; and, therefore, the corporation had no

statutory defence to the plaintiffs' action, and were liable to the plaintiffs for the nuisance; and, in regard to nuisance, the question of non-feasance, as distinct from misfeasance, was irrelevant, the question being whether the thing complained of as a nuisance was expressly or impliedly authorised by the Act under which the works in question were constructed.

*Glossop v. Heston & Isleworth Local Boards* (1879) (44 J.P. 36), and *A.-G. v. Dorking Guardians* (1882) (20 Ch.D. 595), distinguished.

Per DENNING, L.J.: The distinction between misfeasance and nonfeasance is valid only in the case of highways repairable by the public at large. It does not apply to any other branch of the law. I am well aware that in 1924, in *Hesketh v. Birmingham Corpn.* (88 J.P. 77), SCRUTTON, L.J., said: "The general rule is that a local authority is liable for misfeasance but not for non-feasance". But when he said that, I fear that, for once, Homer nodded. It would, I think, be very unfortunate if the exemption for non-feasance was extended to local authorities generally. Even in highway cases, it has been said to be unsatisfactory. It introduces distinctions so fine as to be scarcely perceptible, and it is only to be explained on historical grounds. If we put highway cases on one side, there are innumerable cases to be found where public authorities have been held liable for non-feasance. . . . Liability for nuisance has been applied in the past to sewage and drainage cases in this way. When a local authority take over or construct a sewage and drainage system which is adequate at the time to dispose of the sewage and surface water for their district, but which subsequently becomes inadequate owing to increased building which they cannot control, and for which they have no responsibility, they are not guilty of the ensuing nuisance. They obviously do not create it, nor do they continue it merely by doing nothing to enlarge or improve the system. The only remedy of the injured party is to complain to the Minister of Health. It is very different, however, when the local authority themselves do the increased building, or permit it to be done, because they are then themselves guilty of the nuisance. They know (or ought to know) that the increase in building will cause the existing sewers to overflow, and yet they allow it to go on without enlarging the capacity of the sewage system. By so doing, they themselves are helping to fill the system beyond its capacity, and are guilty of the nuisance. In the nineteenth century local authorities had no authority over increased building. They did not build dwelling-houses themselves and could not control building by others, and anyone who built a house had a statutory right to connect it to the sewer. But in the last few years, the position has radically changed. The local authorities have built more houses than anyone else, and under the Town and Country Planning Acts they have full control over the building in their district. They cannot now disclaim responsibility for increased building. By building houses themselves or permitting others to build them, they become responsible for any nuisance that results from the sewage system.

(ii) where an actionable nuisance had been created, the court would *prima facie* restrain the wrongdoer from persisting in his activities, and, although the court might, in special circumstances, leave the injured party to his remedy in damages, the mere fact that the wrongdoer was a local authority was not a circumstance of that character; the fact that, under the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 56A, the corporation would be unable to do the necessary work without a licence from the Minister of Works was not a sufficient reason why the ordinary practice should not be followed; the court, however, would not impose on a local authority, or on anyone, an obligation to do something which was impossible; and, therefore, the judge had rightly ordered the operation of the injunction to be suspended for a time.

Decision of HARMAN, J. ([1952] 1 All E.R. 1326), affirmed.

APPEAL by the second defendants, Derby Corporation, and the third defendants, British Electricity Authority (East Midlands Division), from an order of HARMAN, J., dated Apr. 9, 1952, and reported [1952] 1 All E.R. 1326, in an action for damages and injunctions in respect of the pollution of certain stretches of the river Derwent and the river Trent.

The first plaintiff, the Pride of Derby and Derbyshire Angling Association, Ltd., was the owner or occupier of a fishery on the rivers Trent and Derwent at a point round about their confluence and running up the latter river about six miles, and it also had fishing rights at two points on the south bank of the river Derwent. The second plaintiff, the Earl of Harrington, was riparian



owner of a considerable stretch of both rivers, the material part consisting of about seven miles of water beginning slightly below their confluence and running up the Derwent to a bridge known as Borrowash Bridge. In an action against British Celanese, Ltd., Derby Corporation and the British Electricity Authority, the plaintiffs claimed *inter alia* (i) an injunction restraining each of the defendants from causing or permitting any effluent to flow or pass from the premises of such defendant at Spondon, in the county of Derby, into the river Derwent so as to pollute (either by itself or in combination with any effluent discharged into such river by any of the other defendants or any other persons) the waters of (a) the river Derwent where they flowed past or over the lands below Borrowash Bridge and above the confluence of that river with the river Trent where the first plaintiff was owner of the bed thereof or of a several fishery therein, and the second plaintiff was owner of the banks or bank thereof, or (b) of the river Trent immediately below its confluence with the river Derwent where the first plaintiff was owner of a several fishery therein, or entitled as tenant to a right of fishing, and the second plaintiff was owner of the banks or bank thereof; (ii) an injunction restraining the first defendant, British Celanese, Ltd., or the third defendants, the British Electricity Authority, from causing or permitting any effluent to flow or pass from their respective premises at Spondon into the river Derwent so as perceptibly to alter (either by itself or in combination with any other effluents discharged into such river by any of the other defendants or any other person) the temperature of the waters of the river where they flowed past or over any of the plaintiffs' premises; (iii) damages in trespass and nuisance against all the defendants.

Each of the defendants maintained works on or near the banks of the river Derwent near Spondon, up-stream of the plaintiffs' waters and below Derby. After leaving Derby and immediately below Raynesway Bridge, the river took three loops to the north. On the north bank of the first loop, the corporation had constructed sewage works under powers conferred on them by the Derby Corporation Act, 1901. The works had been extended under the Derby Corporation Act, 1930, but, owing to the increase of the population of Derby, they were now inadequate, and sewage matter which was insufficiently treated was discharged into the river from the sewage works by means of a pipe or drain. On the second loop of the river were the first defendant's works. About fifty-four million gallons of water were taken daily into the first defendant's lagoons and some of this water was returned to the river in a heated and extremely foul condition. On the third loop (and nearest to the plaintiffs' waters) were an electric generating station and works, which were constructed under the Derbyshire and Nottinghamshire Electric Power Acts, 1901 and 1929, and were now vested in and maintained by the third defendants, British Electricity Authority, under the Electricity Act, 1947. To cool their condensers, the electricity authority took about a hundred and twenty million gallons of water daily from the river, and, as the water was already foul when it reached the generating station, a small quantity of chlorine was infused into it at the intake to neutralise the damage which it would otherwise do to the machinery. After use, the greater part of this water was returned to the river at a greatly increased temperature. Immediately after leaving Derby the river was in a reasonably clean condition, but by the time it reached the plaintiffs' waters, it was heated and extremely foul and could not sustain fish life. Shortly before the hearing of the action, the first defendant admitted that its activities polluted the stream to the detriment of the plaintiffs and

submitted to some form of relief by way of injunction. The corporation and the electricity authority each denied liability and each contended that their own activities were not sufficient to cause a nuisance. The corporation further contended, *inter alia*, that, if a nuisance arose from their works, they were absolved as they were under a statutory duty to do the things which created a nuisance. The electricity authority contended, *inter alia*, that they were empowered by s. 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, to abstract water from the river and use it in the way in which they did.

HARMAN, J., held that the plaintiffs had established a good cause of action against all three defendants and granted an injunction against them. Having ordered an inquiry as to damages, the learned judge apportioned the damage between the defendants at their request. The corporation appealed from the decision of HARMAN, J., on the ground, *inter alia*, that they were under a statutory duty to provide a sewage system for Derby, and, therefore, in the absence of negligence on their part, the plaintiffs had no cause of action against them. The electricity authority, while accepting that an injunction should be granted against them, appealed against the form of the injunction on the ground that it was too wide. In the event of both or either of these appeals being successful, the plaintiffs appealed against the apportionment of damage.

*Sir Andrew Clark, Q.C.*, and *Hesketh* for the second defendants, Derby Corporation.

*Salt, Q.C.*, *Willis, Q.C.*, and *S. I. Levy* for the third defendants, British Electricity Authority.

*Russell, Q.C.*, *Newsom* and *J. A. Gibson* for the plaintiffs.

*Teague* for the first defendant, British Celanese, Ltd.

**SIR RAYMOND EVERSHED, M.R.:** This is an action for pollution of the River Derwent east of Borrowash Bridge and up to the point of its confluence with the River Trent. The claim also extended to some pollution of the River Trent itself. The plaintiffs in the action are the Pride of Derby and Derbyshire Angling Association, Ltd., which is concerned with the state of the fishing in the stretch of the rivers in question, and the Earl of Harrington, who is a riparian owner on a considerable part of the rivers concerned. As such riparian owner, his common law rights in certain respects are more extensive than the rights of the plaintiff association, a point which is relevant to the appeal of the British Electricity Authority, and to which I shall in due course return. There were originally four defendants to the action: British Celanese, Ltd., Derby Corporation, the British Electricity Authority (East Midlands Division) and Midland Tar Distilleries, Ltd. The last-named defendants discontinued operations in this neighbourhood at an early stage, and the proceedings were, accordingly, stayed against them. The action proceeded to trial against the first three defendants. A large part of the judgment of HARMAN, J., is concerned with proof of the pollution on the part of each of the three defendants. He concluded that the material stretch of the river was very gravely polluted and was in a state such as extinguished therein all fish life and also all fish food. He also concluded that, although the first defendant, British Celanese, Ltd., was the most serious offender, the second and third defendants substantially contributed to the pollution, and, accordingly, that all three defendants were liable to the plaintiffs. He rejected the proposition that, since all defendants were individually polluting, none could be made liable, a proposition which seems to bear some analogy to the principle

that a man armed with several umbrellas must be taken to have no umbrella at all. We are not concerned with these matters because there is no appeal in respect of any of them. As to the second defendants, Derby Corporation, the learned judge said:

"I cannot doubt, having heard the evidence, that the solids put into the stream by the corporation are a substantial contribution to the state of things existing in the plaintiffs' waters."

As to the third defendants, the electricity authority, he said:

"I find, therefore, that the power company's activities in the present state of the river sensibly contribute to the harm that is being done to the plaintiffs. Moreover, I accept the evidence of Dr. Steven, another scientist called by the plaintiffs, that, even if this were a clean stream, these activities, though perhaps not harmful to the plaintiffs in the winter months, would be harmful in the summer when the natural temperatures are higher."

Finally, at the end of his judgment, he said:

"In the upshot, therefore, I hold that the plaintiffs have established a good cause of action against both the corporation and the power company, as they admittedly have against the first defendant."

The learned judge made the following order:

“ This court doth order that each of them [British Celanese, Ltd., Derby Corporation and British Electricity Authority] (which defendants are in this order collectively referred to as the said defendants) be perpetually restrained from causing or permitting (whether by their respective servants or agents or workmen or otherwise howsoever) any effluent to flow or pass from their respective premises in the county of Derby in the pleadings mentioned into the river Derwent (a) so as sensibly to alter (either by itself or in combination with any effluent discharged into the said river by any of the said defendants or any other person) the quality (including the temperature) of the waters of the said river Derwent or the waters of the river Trent where the same flow past or over any part of the plaintiffs’ premises as mentioned and defined in the statement of claim to the injury of the plaintiffs or either of them or their respective sequels in title or of any person or persons claiming under or through them or any of them in respect of the plaintiffs’ said premises or any part thereof, or (b) so as to interfere (either by itself or in combination as aforesaid) with the enjoyment by the plaintiffs or either of them or their respective sequels in title or any person or persons claiming under or through them or any of them of the right of fishing in any part of the plaintiffs’ waters as mentioned and defined in the statement of claim.”

Then, after a reference to certain undertakings, it was ordered:

"That the operation of the foregoing injunction be suspended until Apr. 30, 1954,"

i.e., approximately two years from the date of the order. The learned judge ordered an inquiry as to damages. The order proceeds:

"And the said defendants by their counsel consenting to this apportionment it is ordered that the damages which upon the taking of such inquiry shall be certified as aforesaid be paid by the said defendants in the following proportions, namely: the defendant company [British Celanese, Ltd.] one half, the defendant corporation one quarter, the defendant authority one quarter."

I need not refer to the rest of the order, which related to costs and matters of that kind, save to note that at the end of it there was included a direction: "And the parties are to be at liberty to apply as they may be advised". The apportionment of the obligation to pay damages will be noted. As each of the three remaining defendants are substantial, the plaintiffs are content with the result so long as neither of the appeals now before us succeeds. If either or both should succeed, then the plaintiffs have appealed, but their appeal has not yet been called on.

[His LORDSHIP summarised the facts, and continued:] The first appeal, that of Derby Corporation, raises two points, one being of a secondary character, and arising only if the corporation fail on the first. Their first and main contention is of this nature. They say (a) that they are a local authority charged by legislation (in their case, special legislation) with the duty of providing a sewerage system for the county borough of Derby; (b) that the present sewerage system, including the sewage disposal works, were originally constructed by them strictly in accordance with, and as contemplated by, their special legislation, viz., the Derby Corporation Act, 1901, and that at the time when they were first constructed, these works were effective to deal with the sewage of Derby without polluting the river Derwent; (c) that, after the sewerage works were enlarged, pursuant to and as contemplated by the Derby Corporation Act, 1930, they were again effective to deal with all the sewage of Derby without polluting the river Derwent; (d) that at no time has it been shown that the corporation have been guilty of any fault, such, for example, as failure to keep their system in a proper state of repair; and (e) that the pollution is the result of the fact that the system, which had become inadequate before 1930 through (and solely through) the increase of the population of Derby, has again become inadequate from similar causes, those causes being wholly beyond the control of the corporation. On those premises, the corporation say that the plaintiffs have no cause of action against them. The plaintiffs' remedy, they say, is solely by way of application to the Minister of Local Government and Planning under the Public Health Acts, calling on him to take, if he thinks fit, such steps as may be required to compel the corporation once more to enlarge their sewerage system. At most, say the corporation, the remedy of the plaintiffs is to obtain, under the Acts, compensation as therein provided for the damage that they have suffered: see Public Health Act, 1936. Counsel for the Derby Corporation contended, in brief, that, once it is established that the work, being work of a local authority duly authorised by Act of Parliament, was completed in accordance with the Act, and was satisfactory at the time when it was completed, then if at a later date, owing to circumstances beyond the control of the local authority (and in the absence of any negligence on their part), the system so functions as to cause a nuisance, that is a mere non-feasance, and the only remedy of anyone damaged is, as I have indicated, under the Public Health Acts. There is no dispute about the premises as I have stated them. The question is in regard to the validity of the conclusion.

The secondary argument of the corporation was that if the plaintiffs had a cause of action, the judge ought not to have granted an injunction, but should have left them to their remedy in damages. That argument was based, primarily, on the peculiar difficulties of the corporation, having regard, among other things, to the necessity of licences for building operations, under the Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927, as amended), reg. 56A, and also to the fact that any money required for undertaking works



of reconstructing the sewerage system could be borrowed only with the consent of the Minister of Health. Counsel for the corporation contended that an injunction should never be granted against a local authority, at any rate in regard to its sewerage works, since an injunction, though negative in form, was mandatory in substance and would be a means of bringing improper pressure to bear on the Minister of Works in the exercise of his duties in granting licences. He further contended that it was a wrong interference with the corporation's right to deal with their problems in such order as they thought fit.

I can dispose summarily of the corporation's submission that the injunction would operate in some way as bringing pressure on the Minister of Works. I have no doubt whatever that the Minister will perform his duty of granting licences and priorities in respect of licences with impartiality, and with the single aim of faithfully performing his duty to the national benefit. The existence of the injunction will, no doubt, make clear to him that the pollution of the river by the Derby Corporation is serious (as the corporation now admit that it is) and that ameliorative measures in respect thereof are urgent. As for the point that the injunction constitutes, as it were, an invasion of the sovereign authority of the corporation to decide as they choose what operations to perform and when, I say no more than that, in my judgment, such a submission is without warrant or foundation.

It is clear that, if a public authority so exercise any of their functions as to cause a private nuisance to any person, the authority, like any other subject, are liable in consequence to be sued in these courts, unless they can rely on some statute as providing, by express language or necessary or proper inference, a defence to such an action. So much appears, for example, from *Metropolitan Asylum District v. Hill* (1). In the present case, the corporation have set up the Derby Corporation Act, 1901, as their defence. The Derby Corporation Act, 1930, for present purposes adds nothing to what may be extracted from the Act of 1901. The first and principal question, therefore, is the construction and effect of the Derby Corporation Act, 1901. That Act made provision in Part V, s. 105 to s. 117, for the "Sewerage and sewage disposal works" with which we are concerned. Section 105 provided that:

"The corporation may appropriate and utilise for the treatment and disposal of sewage the lands described in sched. V to this Act . . ."

The lands so described are those shown on the sketch plan which was used by both sides in this case. Section 106 reads:

"Subject to the provisions of this Act the corporation may make and maintain in and according to the lines situations and levels shown on the deposited plans and sections the sewerage works hereinafter described together with all necessary and proper intakes outfalls overflows sewers drains channels weirs sluices junctions syphons engines pumps boilers machinery culverts shafts tanks manholes filters contact beds works buildings and conveniences connected therewith and may enter upon take and use such of the lands delineated upon the deposited plans and described in the deposited books of reference as may be required for that purpose."

Although that section is in terms permissive, I assume in the corporation's favour (and I think that the assumption is well-founded) that the effect of s. 112 and s. 117 is that these works were not only permissive, but were, in fact, directed and certainly contemplated. There then follows in s. 106 a short description of the various works which were to be undertaken, a total

altogether of twenty-three. The works particularly connected with the sewage disposal works are Nos. 15, 16, 17, 18 and 19. The Act then contains a number of sections, familiar in legislation of this kind, for the protection of various bodies of persons or corporations. Thus s. 107, according to the marginal note is: "For protection of Midland Railway Company as to sewage works". Section 108, again, according to the marginal note, is: "For protection of Derbyshire County Council". The most important section for our purpose is s. 109, which has the marginal note: "For protection of the parish of Spondon". Section 109 is as follows:

"(1) The sewage disposal works constructed on the lands acquired under the powers of this Act shall at all times hereafter be conducted so that the same shall not be a nuisance and in particular the corporation shall not allow any noxious or offensive effluvia to escape therefrom or do or permit or suffer any other act which shall be a nuisance or injurious to the health or reasonable comfort of the inhabitants of Spondon and this Act shall not exempt or be deemed to exempt the corporation from any liability for any nuisance arising from such sewage disposal works or from any proceedings which might but for this Act be taken against them under the provisions of the Public Health Acts or otherwise and the county council may take any proceedings they may think fit for the purpose of enforcing or giving effect to these provisions. (2) The corporation shall within six months after they have acquired under the provisions of this Act the lands described in sched. V hereto reserve out of the same a strip of land ten yards in width along the northern boundary of such lands and shall forthwith plant the said strip with trees and evergreen shrubs so as to form an effectual screen in front of the rest of the lands and shall for ever afterwards maintain the same so planted. The rural district council may take such proceedings as they think fit for the purpose of enforcing or giving effect to the provisions of this sub-section."

"The rural district council" there must mean the rural district council of Spondon. Section 110 is described in the marginal note as:

"For protection of Great Northern Railway Company as to sewage works."

Before passing from that group of sections, it is to be noted that, except in the case of s. 109, each of the other sections begins in effect by specifically stating that the provisions are for the protection of the named persons or corporations. In the case of s. 107, it is not quite so clear. The language begins:

"In executing the works by this Part of this Act authorised where the same will affect any railway . . . of the Midland Railway Company . . . the following provisions shall unless with the previous consent of the Midland Company . . . apply and have effect . . ."

But s. 108 opens: "For the protection of the county council", and, similarly, s. 110 opens: "The following provisions for the protection of the Great Northern Railway Company".

Section 113 is of some importance, and is as follows:

"The corporation may divert all brooks streams and waters which can or may be intercepted or taken by the sewers authorised by this Part of this Act and the corporation may by means of such sewers discharge or permit to flow into the river Derwent the waters so intercepted or taken together with any effluent and other waters passing over or through or

discharged from the sewage disposal works of the corporation: Provided that nothing in this Part of this Act contained shall authorise the corporation to construct any works or do any other thing in contravention of the Rivers Pollution Prevention Act, 1876, or s. 17 of the Public Health Act, 1875: Provided also that the corporation shall pay compensation to any person for any damage sustained by reason of the exercise of the powers of this section the amount of such compensation failing agreement to be settled by arbitration under the Arbitration Act, 1889."

Section 115 contains divers provisions as to the main drainage area. Section 115 (15) deals with the obligations of local authorities having branch sewers which they are to connect with the main sewers of the corporation constructed under the Act, and at the end of the sub-section is a proviso in these terms:

"Provided that the corporation shall keep the local authorities respectively indemnified against any breach of the Rivers Pollution Prevention Acts, 1876 and 1893, or the general law which may be committed by the corporation in reference to the treatment and disposal by the corporation of the sewage of the local authorities respectively and not arising through any neglect or default on the part of the local authorities respectively."

The first matter to consider is the effect of s. 109. It was contended on behalf of the corporation that this section was solely for the protection of the parish of Spondon, or, alternatively, that it was a further section for the protection of the Derbyshire County Council. For the proposition that it was exclusively for the protection of the parish of Spondon counsel for the corporation relied on the marginal note, which so states. I assume in this case that it is permissible to have regard to these marginal notes, for it appears that they formed part of the Act when it was passed. If, therefore, there should arise an ambiguity in the meaning of the section, it would be permissible to see whether the marginal note offered any solution for the ambiguity. In my judgment, however, there is no ambiguity whatever in this section. If any ambiguity arises at all, it is solely injected by the marginal note itself, and I cannot accept the argument that the marginal note should then have the effect of resolving in a particular way an ambiguity for which it is itself wholly responsible. The language of the section seems to me to be almost too plain for argument. Section 109 (1) reads:

"The sewage disposal works . . . shall at all times thereafter be conducted so that the same shall not be a nuisance . . ."

That is perfectly general. But the sub-section then goes on to give a particular illustration of the general:

" . . . and in particular the corporation shall not . . . do or permit or suffer any . . . act which shall be a nuisance or injurious to . . . the inhabitants of Spondon . . ."

If the argument is right that this section operates solely for the protection of the parish of Spondon, the generality at the beginning "so that the same shall not be a nuisance" must be treated as wholly otiose or meaningless. But that is not the end. The sub-section continues, after the copulative "and":

" . . . and this Act shall not exempt or be deemed to exempt the corporation from any liability for any nuisance arising from such sewage disposal works or from any proceedings which might but for this Act be taken against them . . ."

Pausing there again, it is to be observed that those words are wholly general, and are not confined to the parish of Spondon. The sub-section then goes on: "under the provisions of the Public Health Acts or otherwise". "Or otherwise" again seems to me to mean exactly what it says. It means that this Act is not to exempt the corporation from liability for nuisance, or from proceedings for nuisance which might be taken against them either under the Public Health Acts or otherwise—e.g., under the general law. Nor can I read the final words of the sub-section, giving liberty to the county council to take any proceedings which they may think fit, as excluding the rights of other persons to take proceedings which they may be entitled to take. It is true that s. 109 (2), relating to the planting of the ten yards of trees and evergreen shrubs, is exclusively for the benefit of the parish of Spondon which lies to the north, or on the left bank of the river, but it appears to me impossible to hold, on the ordinary meaning of the words of s. 109, that the only persons to whom protection was given by the section were the parishioners or rural district council of Spondon. There remains the use of the word "conducted" in the opening phrase of s. 109 (1): "The sewage disposal works . . . shall at all times hereafter be conducted". Counsel for the corporation tried to persuade the court that the word "conducted" was one of narrow significance—narrower, for example, than the words "use and keep" in the Public Health Acts. I cannot so construe it. The word "conduct" seems to me to mean "manage" or "operate". Section 109 (1), therefore, is, in my judgment, a prohibition against the corporation managing or operating their disposal works so as to cause a nuisance.

I hope I shall be forgiven for dealing only in a sentence with the alternative submission that s. 109 is solely for the protection of the Derbyshire County Council. I do so because, quite frankly, I have been unable to comprehend it. The submission rests, I gather, on the circumstance that at the end of s. 109 (1) there is the reference to the fact that the county council may take any proceedings they may think fit. Such a submission is obviously in direct conflict with s. 109 (2) and with the marginal note on which counsel for the corporation based his first contention. I can see no foundation for the argument. Section 109 seems to me not only to forbear from giving permission, express or by implication, to operate the sewage works so as to cause any other person a nuisance, but expressly to forbid it.

I agree with the learned judge that s. 113, from which counsel for the corporation sought to derive some support, is directed merely to giving power to the corporation to divert brooks or streams and to use them when diverted for carrying sewage. But that permission, however far it may extend, is subject to the first proviso to the section, viz., that:

" . . . nothing in this Part of this Act shall authorise the corporation to construct any works or do any other thing in contravention of the Rivers Pollution Prevention Act, 1876, or s. 17 of the Public Health Act."

I agree that the words "in contravention of" are not very apt. The reference to the Rivers Pollution Prevention Act, 1876, is, undoubtedly, to s. 3 of that Act, which provides:

" Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any solid or liquid sewage matter, shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act . . . "



Those words indicate that a form of penal proceeding is provided under the Act for commission of the offence created. The Public Health Act, 1875, s. 17, provides:

"Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake."

That section is, in part, a proviso to the powers which precede it, and, in part, an implied authority. Counsel for the corporation contends that the use of the phrase "in contravention of", in s. 113 of the Act of 1901, means that, if proceedings are started against the corporation under the Rivers Pollution Prevention Act, 1876, or under the Public Health Acts, then the Act of 1901 cannot be set up as a defence. I cannot agree with that contention. It appears to me that, though the phrasing is not entirely happy, the meaning is tolerably clear. It is to the effect that nothing in the Act of 1901 is to be taken to authorise the corporation to do anything which would or might cause the corporation to be proceeded against under either of the Acts mentioned. That in no way qualifies or affects their liability (in the event of their so doing) to other persons who may be damaged in consequence. It follows, therefore, that the power to divert streams, and the consequential power to carry the diverted streams laden with sewage into the Derwent, is subject to the limitation which the first proviso to s. 113 puts on it, and, unless the condition of that proviso is satisfied, then there is no power whatever under s. 113 to do what the section otherwise authorises. That result must be borne in mind when dealing with the second proviso to s. 113.

The second proviso to s. 113 is that the corporation are to pay compensation for damage sustained by reason of the exercise of the powers "of this section". If, therefore, what is done is a "contravention" of the Rivers Pollution Prevention Act, 1876, or the Public Health Act, 1875, then the thing done is not something done under the powers of the section, and the second proviso, accordingly, has no application. I, therefore, think that s. 113 reinforces the view which I have expressed on s. 109. Certainly it is, in my judgment, of no assistance to support the main contention of the corporation. I agree with the learned judge that s. 115 (15), with its reference to proceedings under the general law, also tends to support (and to support not negligibly) the view which I have formed on the meaning of s. 109. I, therefore, agree with HARMAN, J., that the discharge through this pipe of the effluent from the sewage disposal works is not only something not expressly or impliedly permitted under this Act, but is, in terms, expressly prohibited by it. If that view is right, it is, as counsel for the corporation frankly admits, the end of the appeal by the corporation on their main point. But, as we have heard a very full argument on a number of cases relating to the Public Health Acts, starting with the well-known case of *Glossop v. Heston and Isleworth Local Board* (1), and in case I am wrong in my construction of the Act of 1901, it is, perhaps, useful and proper that I should make some observations, so far as they are relevant to the present case, on these more general matters.

In *Glossop v. Heston and Isleworth Local Board* (1) the plaintiff, who was

(1) (1879), 44 J.P. 36; 12 Ch.D. 102.

the owner of a house and pleasure-grounds within the district of the defendant local board, claimed an injunction restraining the local board from permitting sewage, or water polluted by sewage or other offensive matter, to pass through the drains or channels under their control into the river Crane in such a manner as to render the water of the river unfit for use by the plaintiff. The river was stated to be

" . . . an ancient watercourse passing through the plaintiff's pleasure-grounds, and at a distance of about thirty yards from his house."

In November, 1875, by virtue of the Public Health Act, 1875, the channels and drains, which were the sewerage system of the neighbourhood, and which had been made by the predecessors of the defendant board, were vested in the board. The plaintiff complained to the board that the river was polluted with sewage poured into it from the drains and sewers, and, nothing having been done to abate the nuisance, he commenced the action in July, 1876, within a matter of months after the vesting had taken place. The defendants, in their defence, denied the existence of the nuisance, and alleged that the state of the river Crane was the same as it had been for more than twenty years and that it had received a considerable amount of sewage for many generations. They stated that they had not had time to provide a proper system of sewers for their district, but intended as speedily as possible to provide a proper system of sewers and proper sewage works. The plaintiff moved for an injunction in the terms of his claim, and by consent that was turned into the trial of the action, and both parties gave evidence. It is, I think, important to bear those facts in mind, as MALINS, V.-C., granted the relief which the plaintiff sought, but his decision was reversed by the Court of Appeal. JAMES, L.J., clearly formed the view that, whatever might on the face of the pleadings have been the nature of the plaintiff's complaint and of his cause of action, he was seeking, by a mandatory order of the courts, to compel the defendant board to expedite the intention which they had expressed of providing a proper system of sewage for their district. JAMES, L.J., said:

" It is quite manifest, from the form of the claim and the evidence, that the action was not based upon any act whatever done by the defendants. It is based entirely upon their alleged neglect to perform the Parliamentary duty cast upon them as the sanitary authority of a particular district. It is said that this is a very serious matter to the plaintiff and to the public generally. It appears to me that if this action could be sustained, it would be a very serious matter indeed for every ratepayer in England in any district in which there is any local authority upon which duties are cast for the benefit of the locality. If this action could be maintained, I do not see why it could not in a similar manner be maintained by every owner of land in that district who could allege that if there had been a proper system of sewage his property would be very much improved. I do not see why, if that is so, every owner of property in London which has not received the benefits it ought to have received from a complete system of sewage carried out by the Metropolitan Board of Works might not say, 'My court or alley is not properly cared for', and who might not bring an action against the Metropolitan Board of Works or any local board having duties in the district, and why he would not be entitled to bring it on the very day the board was constituted and the duties cast upon it. According to my view there is no sufficient principle to sustain that, and no authority really which comes near it, except the authority of the case before HALL, V.-C., which I will refer to."

After a reference to s. 13 of the Public Health Act, 1875, JAMES, L.J., continued:

"If the sewer, being in the state in which it was transferred to [the defendants], would, independently of the Act of Parliament, give to any landowner or any riparian proprietor a right to an injunction to restrain the use of that sewer, or the abuse of that sewer, it appears to me they would be in the same position as any other owner of a sewer would be. But the case here is not based upon any common law nuisance, or any nuisance existing, or any damage existing irrespective of the neglect of the Act, but upon the alleged neglect to comply with the provisions of the Act of Parliament."

At the end of his judgment, after referring to certain cases, JAMES, L.J., said:

"But those cases have no application to this case, where all that can be alleged against the defendants, even if the allegation were sustained, which does not appear to me to be the case, is, that they have not, within a reasonable time, performed the public duty which they owed, not to the plaintiff, but to the district in which the plaintiff is one of the inhabitant landowners. The only case the plaintiff has alleged or attempted to prove is that he has not been relieved from a damage to which he was subject before this body were called into existence in the way he hoped to be, and as he would be if they had done their work in draining this district."

Whether JAMES, L.J., did full justice to the nature of the plaintiff's claim as pleaded is, perhaps, open to some doubt. BRETT, L.J., and COTTON, L.J., expressed themselves somewhat differently. BRETT, L.J., opened his judgment thus:

"It seems to me in this case that the defendants have not been guilty of any wrongful act, and they have not been guilty of any neglect which gives the plaintiff a right to any remedy of any kind. But if they have been guilty of any neglect, the proper remedy has not been asked for, neither has the proper court been applied to."

Later, he posed this question:

"Under those circumstances what is their position with regard to the law? They have done no act. It is suggested it might have been proved they had done some act, and it was said the plaintiff was taken by surprise. I cannot accede to that argument."

After referring to *A.-G. and Dommes v. Basingstoke Corpn.* (1), a decision of SIR CHARLES HALL, V.-C., BRETT, L.J., said:

"So, indeed, I am inclined to think that in the present case, under this statute [the Public Health Act, 1875], if the former board had done an act that would have given the plaintiff a right to damages or to some other remedy, and the effect of that act continued in the defendants' time, the defendants would have been liable for the continuance of the consequences of that act, and would have been liable to an injunction."

COTTON, L.J., said:

"I agree with BRETT, L.J., that, as regards the question of fact, if the right of the plaintiff would follow our decision on that, he has made out his case; that is to say, he has shown, in my opinion, that the water in this stream is in such a state that if that were the result of an action of

(1) (1876), 45 L.J.Ch. 726.

an individual or a body not having Parliamentary authority to put the stream into such a state, or to do acts which necessarily brought the stream into that state, he would have a ground of action against them. But although that is established, it is a very different thing and a very different consideration whether as against these defendants he is entitled either to the decree granted by the Vice-Chancellor or to any decree in this action . . . it must not be supposed, although I concur in thinking that the plaintiff is not entitled to any decree, that I am of opinion (or that the rest of the court are of opinion) that the defendants have a right under this Act of Parliament to make any new sewer, and thereby to conduct any fresh sewage matter into the river Crane. In my opinion, if they were intending to do so, or had done so, there would be a clear case on the part of the plaintiff for an injunction against the defendants, because that would be within the clear prohibition of the Act of Parliament [s. 17 of the Public Health Act, 1875]. The decree against them in substance, no doubt, was intended to be a decree against them to restrain them from permitting any sewage to go into the river Crane. It is not said they have done any act the consequence of which has been to bring the sewage down to the river Crane. If that were so, unless they could show that in doing that act, and so causing a nuisance to the plaintiff, they are protected by the Act of Parliament, it would be the duty of this court, as it has done in many cases already, to restrain the defendants from creating a nuisance, and although they are a public body, having public duties and powers to perform those duties, that would not exempt them from legal liability in consequence of a nuisance caused by them. On the evidence there is no ground for saying they have done that. I shall have to refer to the cases on the point on another part of the case, but it is sufficient to say here that those cases for the present purpose may be disregarded. It is not the act of the defendants that has caused any nuisance to the plaintiff."

That decision was followed in *A.-G. v. Dorking Guardians* (1). I need not refer in detail to that case, but I observe that COTTON, L.J., was also a member of the Court of Appeal which decided it. I share in some degree the difficulty which PARKER, J., felt, in *Jones v. Llanrwst Urban Council* (2), in regard to the ratio decidendi, on the one hand, of JAMES, L.J., and that of BRETT, L.J., and COTTON, L.J., on the other. PARKER, J., used this language:

"I think it clear that the principle of *Rylands v. Fletcher* (3) would apply to the owner of a sewer, whether he made the sewer or not: see *Firth v. Bowling Iron Co.* (4). His duty at common law would be to see that the sewage in his sewer did not escape to the injury of others, and mere neglect of this duty would give any person injured a good cause of action. JAMES, L.J., evidently thought there was no common law nuisance, or at any rate that the action was not a bona fide action to remedy a private wrong. On the other hand, BRETT, L.J., and COTTON, L.J., while holding that the plaintiff would have had a cause of action for what was being done if the sewers in question had belonged to a private person, held that the defendants were not liable because they were a statutory body with only a limited property in, and with only limited powers, and therefore limited duties, with respect to, the sewers transferred to them by the Act. They would be liable for nuisance caused by

(1) (1882), 20 Ch.D. 595.

(2) 75 J.P. 68; [1911] 1 Ch. 393.

(3) (1868), 33 J.P. 70; L.R. 3 H.L. 330.

(4) (1878), 42 J.P. 470; 3 C.P.D. 254.



the exercise of any power vested in them, but not liable, except upon prerogative writ of mandamus, for neglect to perform their statutory duty. In other words, supposing the case put by JAMES, L.J., of an existing nuisance at the time of the transfer, the plaintiff's remedy had, in their opinion, gone altogether, and, so far as I can see, without compensation. In *Foster v. Warblington Urban Council* (1) STIRLING, L.J., seems to have thought that the ratio decidendi of *Glossop v. Heston & Isleworth Local Board* (2) was to be found in the judgments of BRETT, L.J., and COTTON, L.J., and certainly those lords justices constituted the majority of the court. If the explanation of VAUGHAN WILLIAMS, L.J. [in *Foster v. Warblington Urban Council* (1)] is to prevail, I am of opinion that *Glossop v. Heston & Isleworth Local Board* (2) has no application to the present case. I am satisfied that the plaintiff is bona fide complaining of a private wrong, and that he is not, under colour of such a wrong, merely attempting to compel the defendants to fulfil their statutory duty. If, on the other hand, the explanation of STIRLING, L.J., is to prevail, it is impossible to say whether the case applies without tracing the history of the sewerage system of Llanrwst."

But, whatever may be the true ratio decidendi of the judgments in the *Isleworth* case (2) and the *Dorking* case (3) which followed, they must, I think, clearly be taken as deciding that, where a local authority has inherited drains or sewers under the Public Health Act, and those drains or sewers constitute a nuisance by reason only that they have ceased to deal adequately with the sewage of the authority's district, then the local authority, not having themselves been at fault save that they have not used the powers vested in them to enlarge the sewerage system, are not liable to be sued in the courts, for such an action would be, in effect, an action to compel them to exercise their statutory powers or perform their statutory duty. Further, it must, I think, be taken from these cases as established that the word "use", in s. 17 of the Public Health Act, 1875, does not involve a prohibition against the local authority permitting the inhabitants of their district (in exercise of statutory or other power or right authorising them so to do) to put sewage in the local authority's drains or sewers. Similarly, the word "kept" in s. 19 of the Act of 1875 must be construed by reference to its associated words "constructed", "covered" and "ventilated", and does not constitute an obligation to enlarge or re-construct if the drains or sewers have become, in the course of time, inadequate for the quantity of the sewage of the district. But the decisions in the *Isleworth* case (2) and the *Dorking* case (3) are themselves limited to cases where the local authority have, to use the word which I have already used, "inherited" the drains and sewers from some predecessor. They do not in terms cover the case where the local authority have themselves constructed the sewerage system. Indeed, some of the language of BRETT, L.J., and COTTON, L.J., seems to indicate a distinction in that respect vital to the question of liability.

Counsel for the corporation, however, contended that, since the later decisions in *Robinson v. Workington Corpn.* (4) and, more particularly, in *Hesketh v. Birmingham Corpn.* (5), that distinction is no longer valid or maintainable. He said that, if the local authority itself had constructed the drains

(1) 70 J.P. 233; [1906] 1 K.B. 648.

(2) (1879), 44 J.P. 36; 12 Ch.D. 102.

(3) (1882), 20 Ch.D. 595.

(4) 61 J.P. 164; [1897] 1 Q.B. 619.

(5) 88 J.P. 77; [1924] 1 K.B. 260.

and sewers pursuant to the Public Health Act, and the drains and sewers were satisfactory at the time of their completion, then no cause of action would arise against the local authority from mere passive conduct, though the drains and sewers had later become inadequate owing to increase of population. Before passing to the two cases which I have just mentioned, I venture to make one or two observations on non-feasance, to which *JESSEL, M.R.*, and *COTTON, L.J.*, referred in the *Dorking* case (1). The proposition that a local authority is not liable for non-feasance in regard to highways rests, I understand, on particular historical grounds, and it may lead to error or confusion if it is assumed that a similar proposition can be necessarily applied in the case of sewers and drains. As regards sewers and drains, it is, in my judgment, necessary to keep clearly in mind the possibility of two distinct causes of action, namely, (i) for nuisance, and (ii) for negligence. I venture to think that the distinction may not always have been clearly observed in certain of the earlier cases. As regards negligence (and I may say that we are not in this case concerned with negligence, there being no claim for negligence in the statement of claim), it may well be that non-feasance in the sense of failing to perform some positive statutory duty does not give rise to a cause of action for negligence against the local authority in respect of its sewerage system. In regard to nuisance, however, I think that the question of non-feasance, as distinct from misfeasance, has no real relevance. As regards nuisance, the question is whether the thing complained of as a nuisance is expressly or impliedly authorised by the Act of Parliament in accordance with which the works were constructed, or whether (and this is, perhaps, the same thing) the nuisance complained of is the inevitable consequence of that which the Act both authorised and contemplated. On this question, it seems to me that whether the thing complained of can be described as non-feasance or misfeasance is wholly beside the point.

I refer also to one other general matter. It was suggested that local authorities have a special immunity from the so-called rule in *Rylands v. Fletcher* (2). I am not, as at present advised, satisfied that that is so. *PARKER, J.*, clearly applied the rule in *Jones v. Llanrwst Urban Council* (3). So far as relevant to the facts as they are in the present case, I think that the result is the same whether that which is complained of would render the doer of the act liable on the grounds of nuisance or on the grounds of the rule in *Rylands v. Fletcher* (2), if applicable. In either case the question depends on whether the Public Health Act or the special Act, as the case may be, provides, on the principles stated, a defence to the claim which otherwise would lie.

I now come to *Robinson v. Workington Corpn.* (4) and *Hesketh v. Birmingham Corpn.* (5). I need not pause, save for a brief time, on the former. It does not clearly appear from the *LAW REPORTS* that the sewers which were there in question had been made by the corporation sued, but my brother *DENNING, L.J.*, having referred to the report of the case in the *TIMES LAW REPORTS*, has noted that they were so constructed. On the facts of that case, however, it is quite plain that the cause of action was neither more nor less than an attempt to compel performance, for the benefit of the plaintiff and his business, of the statutory duty which was laid on the corporation, under the Public Health Act, 1875, s. 15, to make or provide a proper drainage system.

(1) (1882), 20 Ch.D. 595.

(2) (1868), 33 J.P. 70; L.R. 3 H.L. 330.

(3) 75 J.P. 68; [1911] 1 Ch. 393.

(4) 61 J.P. 164; [1897] 1 Q.B. 619.

(5) 88 J.P. 77; [1924] 1 K.B. 260.

With *Hesketh v. Birmingham Corpn.* (1) I would like to deal in more detail. It is, however, to be noted that that was not a case in which the plaintiff's complaint related to pollution. The nuisance alleged arose from the discharge of excessive quantities of water from a sewer into a brook, and the overflow of the brook. The first contention of the plaintiff was that the defendant corporation had damaged him by a nuisance arising from the largely increased quantity of water passing into the brook. The answer of the corporation to that contention was that the passing of that quantity of water into the brook was authorised expressly, or by necessary implication, by statute. The plaintiff then fell back on a second and alternative point. He contended that, even if the corporation were authorised to pass the water from the sewer into the brook, they were negligent in that they had not done what they could to minimise the damage which he suffered in consequence. The answer to that contention was that it was not negligent for a local authority merely to fail to exercise statutory powers, especially since the Public Health Act, 1875, s. 299, provided a specific remedy for such failure. BANKES, L.J., said:

"The plaintiff's case was that the acts of the defendants in discharging the overflow of the sewers into the brook without any statutory authority in that behalf amounted to a nuisance, or that the defendants were guilty of negligence in continuing to discharge the sewage into the brook after it had become of insufficient capacity to carry it in consequence of the growth of the population. No reference appears to have been made at the trial to the provisions of the Public Health Act, but after Mr. Upjohn's argument [for the defendants] it seems plain that it is impossible to adjust the rights of these parties without reference to the provisions of that Act which are to be found in s. 15, s. 16 and s. 17. Mr. Hurst [for the plaintiff] very frankly told us that those sections were not present to his mind at the time of the trial."

After reading those sections the learned lord justice said:

"The effect of [s. 17] has been considered in . . . *Durrant v. Branksome Urban Council* (2). There NORTH, J., said: 'I think that section recognises in the clearest way that, subject to complying with the provisions of that section, the local authority have a right to empty their drains into a natural stream or canal, pond and so on, observing, of course, the provisions of that section. It is clear from that to my mind that they may turn clean water into a stream, or what I may call cleaned water into a stream. They may even turn water that is sewage or filth into a stream if they free it from such noxious matters as would deteriorate the stream itself'. And CHITTY, L.J., says (*ibid.*, 305): 'The first part of [s. 17] is prohibitory, and it is by way of proviso on something that has gone before. The second part is explanatory. I do not say that by itself it confers a power. I think the better reading is that the power is conferred by s. 16, and in this portion of the section, which says that the sewage is not to be poured in until it is freed from foul or noxious matter, the legislature assumes it had already said something that would justify the pouring of pure water or water not fouled or noxious into the stream or canal'. Therefore you find in the combination of those passages statutory authority for discharging clean or cleaned water into a stream, and if the stream itself is of such a character that the discharge of foul water into it would not affect or deteriorate the purity and quality of the water,

(1) 88 J.P. 77; [1924] 1 K.B. 260.

(2) 61 J.P. 472; [1897] 2 Ch. 291.

you find statutory authority for discharging foul water. Some day an allegation that foul water has been discharged into a stream in such a way as to materially affect its quality may give rise to a serious question as to the party on whom the onus lies of showing that the case does or does not fall within the section."

SCRUTTON, L.J., undoubtedly, used language of a more general character (see, in particular, [1924] 1 K.B. 271), but, in so far as his language supports the broad contention of counsel for the corporation in the present case, it must, I think, be treated as obiter. BANKES, L.J., indeed, seemed to indicate that, in a case where the nuisance complained of was pollution, the fact that the authority had themselves made the sewer would *prima facie* render them liable. If that is right, the case would, on that ground, be distinguishable from the *Isleworth* case (1), even though the nuisance arose merely from subsequent inadequacy of the sewer.

It seems to me, therefore, that the question whether the principle of the *Isleworth* case (1) is applicable only where the authority sued has not itself constructed the sewers complained of as creating a nuisance by pollution has not yet been actually decided. For my part, I see great force in the argument of counsel for the corporation that there is no logical or valid distinction between the case where a local authority have inherited, say, half a century ago, sewers and drains made (and at the time of their construction adequately made) by some predecessor, and a case in which a local authority themselves made, half a century ago, some sewers and drains which, when they were made, were similarly adequate properly to drain the city or town without causing pollution. But I think that it is unnecessary that I should express a concluded view on the point, because, on the facts, I think that the present case is clearly distinguishable from the type of case considered in the earlier authorities. We are here concerned, not with a drain or a sewer down which local inhabitants (having the right so to do) send sewage matter which passes, accordingly, into a river, but with sewage disposal works built on the Derby Corporation's own land. We have not seen the plans which are referred to in s. 106 of the Act of 1901 for those sewage disposal works. We are told that the plans did not contain any drawing of an effluent pipe leading from the sewage disposal works to the river, though, no doubt, some such discharge pipe must have been contemplated. But what the corporation are doing, as I follow it, is pumping or otherwise diverting into the river, by such mechanical or other means as may be there, the effluent after treatment in the beds and tanks of the disposal works on their own land. In my judgment, therefore, as at present advised, if the Public Health Acts applied to this case, or if, contrary to the view which I have expressed, the Act of 1901 ought to be construed as equivalent, in effect, to the Public Health Act, there would be no statutory defence available to the corporation for what they are doing in discharging effluent through this pipe into the Derwent river. And this also, I think, may fairly be noted. This case cannot be called an action obliquely directed to commanding a local authority to perform a public duty. The plaintiffs are claiming damages in respect of injury suffered to their property some miles from the county borough of Derby. They are not concerned with, nor are they complaining about, the method by which the citizens of Derby are provided with a sewerage system. Indeed, if the sewage disposal works were shut down, the inhabitants of Derby, so far as I understand, would not in the least degree be affected. No such frightful results would occur in Derby as would occur if the sewers and drains



themselves were stopped up. The result would be that all the sewage treated with storm water would, presumably, be extruded from the storm water overflows direct into the River Derwent. That, of course, would not in the least help the plaintiffs, but the point is made to demonstrate the true character of the action which the plaintiffs are bringing. The point is one which the learned judge noted (and I think it was a legitimate consideration on his part) where he said:

"The plaintiffs' claim here is not that the corporation have neglected to provide further sewers, although it may be that the remedy for that of which they complain will be the construction of further sewers. They are not ratepayers of Derby who complain of the insufficiency of the drainage of the city. Their complaint is the converse, namely, that the city is so drained that their property outside it is damaged."

It follows that many of the observations which JAMES, L.J., directed to the plaintiff in the *Isleworth* case (1) would, on any view, be quite inapplicable to the present case.

So much for the main point raised by the Derby Corporation. I can deal more briefly with the question of the appropriate remedy, assuming that they are wrong (as I think they are) on their main submission. With some aspects of this matter I have already dealt. I venture to think that the fallacy which underlies this part of the corporation's argument is based on the statement made on their part that an injunction is purely discretionary—if by that is meant that, in a case where a person's rights, such as the plaintiffs' rights, are being damaged and there is a threat of continuing damage, the question whether an injunction will be granted is determined by the court on the balance of convenience on one side or the other. In my judgment, that is not a correct statement of the position. It is, I think, well settled that, if A. proves that his proprietary rights are being wrongfully interfered with by B., and that B. intends to continue his wrong, then A. is *prima facie* entitled to an injunction, and he will be deprived of that remedy only if special circumstances exist, including the circumstance that damages are an adequate remedy for the wrong that he has suffered. In the present case, it is quite plain that damages would be a wholly inadequate remedy for the plaintiff association. The general rule which I have stated applies, in my opinion, to local authorities as well as to other citizens. Equally, of course, the court will not impose on a local authority, or on anyone else, an obligation to do something which is impossible, or which cannot be enforced, or which is unlawful. Therefore, the practice is adopted in the case of local authorities of granting injunctions, and then suspending their operation for a time, long or short. Such a practice has been long established—at least since *A.-G. v. Birmingham Borough Council* (2)—and, frequently applied: see, again, for example, the decision of PARKER, J., in *Jones v. Llanrust Urban Council* (3). The Defence General Regulations, 1939, reg. 56A, is, beyond doubt, a matter proper to be considered, but the mere fact that, without obtaining a licence, the authority would be unable in any case to do the work is not, in my judgment, a sufficient reason why the ordinary procedure should not be followed.

What, after all, are the alternatives? It is suggested by counsel for the corporation that the plaintiffs should be left to bring a series of actions for damages. In every such action the plaintiffs would have again to prove their

(1) (1879), 44 J.P. 36; 12 Ch.D. 102.

(2) (1858), 22 J.P. 561; 4 K. & J. 528.

(3) 75 J.P. 68; [1911] 1 Ch. 393.

case, for the corporation could put them to such proof by a mere traverse of the facts alleged. The result would, obviously, be a vast expenditure of costs, a matter on which, I understand, the corporation are themselves particularly tender. I think that much the same result would follow if the plaintiffs were merely given liberty to apply for an injunction, for they would then, presumably, have to establish as a matter of fact that some circumstances had arisen which then justified the granting of an injunction which had not been granted at the time of the trial. Nor, in my judgment, would the matter be materially affected even if the corporation were to give some kind of undertaking to get on with the work when it was possible or convenient to do so in the ordinary way. It appears to me that, the corporation having been proved to be wrongdoers (and not disputing that they are wrongdoers), the onus should be on them, if they want a further suspension, to satisfy the court that justice requires that a further suspension should be granted. If the corporation show that they are unable to do more than they are doing, or that they cannot get any licences under reg. 56A, then I have no doubt that a further suspension will be granted until such time as this urgent matter can be put in hand. Finally, the objection that the injunction is permanent in form seems to me to be entirely unsubstantial. In any event, there is, at the end of the order, liberty to apply, and, when all the matters of which the plaintiffs complain have been put right, the court will, no doubt, be ready to hear any application which the corporation might be minded to make to discharge the injunction. As a matter, therefore, of jurisdiction and general principle, I see no ground whatever why the injunction which was granted should not be granted. Still less do I see any ground on which this court could be invited to interfere with the discretion exercised by the learned judge. The result, therefore, as regards the Derby Corporation's appeal, is that, in my opinion, the judgment of HARMAN, J., is correct in every particular, and the appeal wholly fails.

I now come to the second appeal, that of the British Electricity Authority. These defendants are not suffering from what I venture to call the complexes about immunity of public corporations from which the Derby Corporation appear to suffer. Like the corporation, the electricity authority accept the findings of fact on the part of the learned judge, and they accept, therefore, the finding that they are substantially contributing—in this case, as I have said, by temperature only—to the pollution of this river. But they also accept that an injunction should go against them. They contend only that the form of that injunction should be qualified, having regard to the language of certain statutory provisions which are applicable to them. The nature of the authority's appeal is sufficiently indicated by their notice of appeal. I have read the injunction granted by the learned judge, and the proposed form of injunction which they seek is this:

"That the order in this action made by HARMAN, J., on Apr. 9 and entered on May 7, 1952, may be varied by inserting after the injunction therein lettered (b) the words: 'Provided that (so far as concerns any alteration in the temperature of the waters of the said rivers caused by any effluent from the said premises of the defendant authority) the foregoing injunctions lettered (a) and (b) shall not enure to [the plaintiffs] or to either of them or to the sequels in title to either of them against the defendant authority so long as the defendant authority shall comply with the proviso to s. 37 (1) of the Derbyshire and Nottinghamshire Electric Power Act, 1929, that is to say, shall return water abstracted from the river Derwent pursuant to the said sub-section (except that unavoidably

lost by evaporation) in such a condition as not to cause (in the waters of the said river where the same flow below and after receiving such effluent) injury to fish '."

[His LORDSHIP referred to the Derbyshire and Nottinghamshire Electric Power Act, 1929, s. 36 and s. 37, and to *John Young & Co. v. Bankier Distillery Co.* (1), and he concluded:] In these circumstances, and having regard, in particular, to the fact that the injunction in its widest form could not be sustained on the part of the plaintiff association, it seems to me that the fair and just thing to do at the present time is to limit the present injunction in the way suggested so as only to prohibit the electricity authority from returning the water, after using it, in such a condition as to cause injury to fish, but to give to the earl (and to his successors in title) liberty to apply for a further injunction, if he should desire to contend, or if he can show, that in some other way some other of his riparian rights are being injuriously affected by the authority's activities. To that extent, therefore, the appeal on the part of the British Electricity Authority succeeds.

DENNING, L.J.: In submitting the appeal of the Derby Corporation, counsel urged that there was a difference between misfeasance and non-feasance. He admitted that the corporation had been guilty of non-feasance because they had not enlarged their sewage works so as to cope with the increased population. But this, he said, did not give rise to an action at law, the only remedy being by complaint to the Minister of Local Government and Planning under the Public Health Acts. There is one decisive answer to that argument, and it is this. The distinction between misfeasance and non-feasance is valid only in the case of highways repairable by the public at large. It does not apply to any other branch of the law. I am well aware that in 1924, in *Hesketh v. Birmingham Corpn.* (2), SCRUTTON, L.J., said: "The general rule is that a local authority is liable for misfeasance but not for non-feasance". But when he said that, I fear that, for once, Homer nodded. It would, I think, be very unfortunate if the exemption for non-feasance was extended to local authorities generally. Even in highway cases, it has been said to be unsatisfactory: see *Swain v. Southern Ry. Co.* (3). It introduces distinctions so fine as to be scarcely perceptible: compare *Boorman v. Brown* (4) (3 Q.B. 526); and it is only to be explained on historical grounds. I tried to trace its history and its limits in a note I wrote in 1939 in the *LAW QUARTERLY REVIEW*, vol. 55, p. 343.

If we put highway cases on one side, there are innumerable cases to be found where public authorities have been held liable for non-feasance. Let me give just four instances over the centuries. In 1594 the parson at Quarleys in Hampshire was under a public duty to keep a common bull for the service of the cows of his parishioners. For three years he neglected to find a bull, and it was held that every inhabitant who had suffered damage was entitled to bring an action: see *Yielding v. Fay* (5). In 1828 the corporation of Lyme Regis were under a public duty to repair the sea wall. They failed to do it, and the sea came in and overran some cottages. It was argued that the corporation were not liable for non-feasance, but they were held liable by all

(1) 58 J.P. 100; [1893] A.C. 691.

(2) 88 J.P. 77; [1924] 1 K.B. 260.

(3) [1939] 2 All E.R. 794; [1939] 2 K.B. 560.

(4) (1842), 3 Q.B. 511; *affd.* H.L., (1844), 11 Cl. & Fin. 1.

(5) (1594), Cro. Eliz. 569.

the courts, and by the House of Lords: see *Henly v. Lyme Corpn.* (1) (5 Bing. 109). In 1900 the Portslade Urban District Council failed to clean out its sewers, and thus caused a nuisance to the plaintiff. It was held by this court that they were liable to an action: see *Baron v. Portslade Urban Council* (2). Finally, in 1938 the Islington Borough Council took over a disused tramway, but took no steps to rid the highway of the danger caused by the derelict tramlines, and they were held by this court to be liable for the consequent death of a cyclist in 1941: see *Simon v. Islington Borough Council* (3). The only cases, other than highway cases, where it has been suggested, at any rate in this court, that a local authority are exempt from liability for non-feasance are the *Isleworth* case (4), the *Dorking* case (5), the *Workington* case (6), and the *Birmingham* case (7), but those were all cases of a particular kind of non-feasance. They were cases where all that could be said against the local authority was that they had failed to carry out their statutory duty to drain their district, and, on the true construction of the statute, the remedy for that omission was not by action at law, but by complaint to the Local Government Board (whose functions were later transferred to the Minister of Health). Those four cases do not illustrate any general exemption for non-feasance, but only the rule that the question whether an action lies for breach of a statutory duty depends on the true construction of the statute. That appears clearly from the explanation which LORD ESHER, M.R., gave of the *Workington* case (6).

Once rid of the distinction between misfeasance and non-feasance, the case can be reduced to simple terms. The first question is: Have the plaintiffs a *prima facie* cause of action at common law? If so, the second question is: Have the defendants a defence by reason of statutory authority? In this case, negligence is not alleged. The only cause of action available to the plaintiffs is an action for nuisance. I pause here to say that I doubt whether the doctrine of *Rylands v. Fletcher* (8) applies in all its strictness to cases where a local authority, acting under statutory authority, build sewers which afterwards overflow, or sewage disposal works which later pour out a polluting effluent, for the simple reason that the use of land for drainage purposes by the local authority is "such a use as is proper for the general benefit of the community", and is on that ground exempt from the rule in *Rylands v. Fletcher* (8): see *Rickards v. Lothian* (9), per LORD MOULTON ([1913] A.C. 280), approved by the House of Lords in *Read v. J. Lyons & Co., Ltd.* (10), per VISCOUNT SIMON ([1946] 2 All E.R. 475) and per LORD UTHWATT (*ibid.*, 484); and also on the ground of statutory authority: see *Hammond v. St. Pancras Vestry* (11) per BRETT, J. (L.R. 9 C.P. 322). But, although the plaintiffs may not be able to rely on the doctrine of *Rylands v. Fletcher* (8) as such, they have a perfectly good cause of action for nuisance if they can show that the defendants created or continued the cause of the trouble, and it must be remembered that a person may "continue" a nuisance by adopting

(1) (1828), 5 Bing. 91; *on appeal, sub nom. Lyme Regis Corpn. v. Henley*, (1834), 1 Bing. N.C. 222.

(2) 64 J.P. 675; [1900] 2 Q.B. 588.

(3) 107 J.P. 59; [1943] 1 All E.R. 41; [1943] K.B. 188.

(4) (1879), 44 J.P. 36; 12 Ch.D. 102.

(5) (1882), 20 Ch.D. 595.

(6) 61 J.P. 164; [1897] 1 Q.B. 619.

(7) 88 J.P. 77; [1924] 1 K.B. 260.

(8) (1868), 33 J.P. 70; L.R. 3 H.L. 330.

(9) [1913] A.C. 263.

(10) [1946] 2 All E.R. 471; [1947] A.C. 156.

(11) (1874), 38 J.P. 456; L.R. 9 C.P. 316.



it, or in some circumstances by omitting to remedy it: see *Sedleigh-Denfield v. O'Callaghan* (1).

This liability for nuisance has been applied in the past to sewage and drainage cases in this way. When a local authority take over or construct a sewage and drainage system which is adequate at the time to dispose of the sewage and surface water for their district, but which subsequently becomes inadequate owing to increased building which they cannot control, and for which they have no responsibility, they are not guilty of the ensuing nuisance. They obviously do not create it, nor do they continue it merely by doing nothing to enlarge or improve the system. The only remedy of the injured party is to complain to the Minister of Health. That was the position in the four "non-feasance" cases which I have mentioned. In the *Isleworth* case (2) and the *Dorking* case (3), the local authority had not themselves constructed the sewers. They had only taken them over from others, and done nothing. In the *Workington* case (4) and the *Birmingham* case (5), the local authority had themselves constructed a drainage system which was quite sufficient at the time, but later became inadequate through increased building which the local authority could not control. It is very different, however, when the local authority themselves do the increased building, or permit it to be done, because they are then themselves guilty of the nuisance. They know (or ought to know) that the increase in building will cause the existing sewers to overflow, and yet they allow it to go on without enlarging the capacity of the sewage system. By so doing, they themselves are helping to fill the system beyond its capacity, and are guilty of the nuisance. That is, I think, fully established by *Hawthorn Corpn. v. Kannuluik* (6) in the Privy Council (of which I have examined the record) and *Hanley v. Edinburgh Corpn.* (7) in the House of Lords. A moment's reflection will show that the four "non-feasance" cases have little or no application at the present day. In the nineteenth century local authorities had no authority over increased building. They did not build dwelling-houses themselves and could not control building by others, and anyone who built a house had a statutory right to connect it to the sewer. But in the last few years, the position has radically changed. The local authorities have built more houses than anyone else, and under the Town and Country Planning Acts they have full control over the building in their district. They cannot now disclaim responsibility for increased building. By building houses themselves or permitting others to build them, they become responsible for any nuisance that results from the sewage system, just as the corporations were responsible in the *Hawthorn* case (6) and the *Edinburgh* case (7).

It would not be right to found the decision in this case on that point, because no evidence was given of the building or planning activities of the Derby Corporation, but their responsibility is amply shown on other grounds. When the increased sewage came into their sewage disposal works at Spondon, they took it under their charge, treated it in their works, and poured the effluent into the river Derwent, but their treatment of it was not successful in rendering it harmless. It was still noxious. Their act in pouring a polluting effluent into the river makes them guilty of nuisance. Even if they did not create the

(1) [1940] 3 All E.R. 349; [1940] A.C. 880.

(2) (1879), 44 J.P. 36; 12 Ch.D. 102.

(3) (1882), 20 Ch.D. 595.

(4) 61 J.P. 164; [1897] 1 Q.B. 619.

(5) 88 J.P. 77; [1924] 1 K.B. 260.

(6) [1906] A.C. 105.

(7) 77 J.P. 233; [1913] A.C. 488.

nuisance, they clearly adopted it within the principles laid down in *Sedleigh-Denfield v. O'Callaghan* (1), and they are liable for it at common law unless they can defend themselves by some statutory authority.

Have they, then, any statutory authority to commit this nuisance? None at all. Like other local authorities, they had statutory authority to pour a harmless effluent into the river, but they had no authority to pour into the river an effluent which was noxious or polluting. That is made plain by s. 17 of the Public Health Act, 1875 (now s. 30 of the Public Health Act, 1936), s. 3 of the Rivers Pollution Prevention Act, 1876 (now s. 2 of the Rivers (Prevention of Pollution) Act, 1951), s. 109 and s. 113 of the Derby Corporation Act, 1901, and *Midwood & Co. v. Manchester Corpn.* (2). The corporation are, therefore, guilty of a nuisance, and are liable in damages to any riparian owner or fishery owner who has suffered damage by it.

The remaining question is whether an injunction should be issued against them. Counsel for the corporation argued that an injunction should not issue. The corporation, he said, could not dam back the sewage because that "would cause a most frightful nuisance" to the inhabitants of Derby, and they could not extend their sewage disposal works because they were prohibited under the Defence (General) Regulations, 1939, reg. 56A, from doing so without the consent of the Minister of Works. These are strong reasons for suspending the injunction, but are no reasons for not granting it. The power of the courts to issue an injunction for nuisance has proved itself to be the best method so far devised of securing the cleanliness of our rivers, and in this connection it is significant that the law relating to nuisance has been expressly preserved by s. 11 (6) of the Rivers (Prevention of Pollution) Act, 1951. The issue of an injunction does not interfere with the power of the Minister to determine the proper order of priority of public works, but it does mean that, if these works are to be deferred, the court will want to know the reason why. Only an over-riding public interest will suffice.

One further point. It has, I believe, been suggested in some of these cases that the individual members of a corporation may themselves be liable to be committed for breach of an injunction. As to that, I would only say, with BLACKBURN, J., in *Mill v. Hawker* (3) that, if it were necessary to decide that question, I should require time for consideration: see what was said by KELLY, C.B. in *Mill v. Hawker* (3). A corporation can in these days be fined—it could not previously—or its property sequestrated for breach of an injunction, but I would not wish to assert that individual members could be committed unless I was satisfied by authority that it could be done. I agree that the appeal of the Derby Corporation should be dismissed.

The appeal of the British Electricity Authority raises only two points of construction. It seems to me that the provision in s. 37 (1) of the Act of 1929 prescribes a standard for the effluent from the generating station. The used water, when returned into the river, must not, by its presence there, cause injury to fish. Section 37 (2) appears to me to be designed to protect the rights of the Earl of Harrington in regard to flow and quantity, but I doubt whether it entitles him to insist on a higher standard for the effluent than anyone else. If the effluent does not cause injury to fish in the river, he has not much cause for complaint. I think that the appeal of the authority should be allowed

(1) [1940] 3 All E.R. 349; [1940] A.C. 880.

(2) 69 J.P. 348; [1905] 2 K.B. 597.

(3) (1875), 39 J.P. 181; L.R. 10 Exch. 92.

to the extent stated by the Master of the Rolls, and I agree with my Lord in the orders that he has proposed.

**ROMER, L.J.:** I also agree. Once it is conceded or established that the deplorable condition of the river Derwent below Borrowash Bridge is due in a substantial degree to the discharge of noxious material from the Derby Corporation's sewage works (and there can be no doubt whatever that such is the fact), then the corporation can escape liability only by showing that the nuisance which has arisen is the inevitable result of the performance by them of that which they are authorised by statute to do. In my judgment, there are two conclusive reasons why that defence cannot succeed. First, the works which the corporation were authorised (and, indeed, compelled) to construct and maintain under the Act of 1901 were not such as inevitably to result in a nuisance by pollution to anyone, and, moreover, no nuisance did, in fact, occur for years after the works were put into operation. It was not inevitable in 1901 that the population of Derby would substantially increase, and there is certainly no indication in the Act of 1901 that Parliament envisaged that it would or might increase beyond the capacity of the authorised works. If the population had remained static, or had increased only slightly, or (as was possible) had decreased, no question of a nuisance would ever have arisen. Secondly, on the construction which the Master of the Rolls has placed on s. 109 of the Act (and with which I entirely agree), it is impossible for the corporation to say that Parliament impliedly authorised them to create a nuisance, for it enacted in unmistakable language by that section that they were not to do so, and this intention of the legislature is fortified, if it needed fortification, by the references, in s. 113 of the Act of 1901, to the Rivers Pollution Prevention Act, 1876, and s. 17 of the Public Health Act, 1875, and see also s. 115 (15) of the Act of 1901. It appears plain to me, therefore, that the corporation have no statutory defence to the plaintiffs' action, and, as they have no other defence, the action must succeed.

I would like, however, to say a few words on the question whether an injunction should be granted against the corporation. It was strongly urged on **HARMAN, J.**, and as forcibly urged on us, that the plaintiffs should be relegated to their right to damages, and that it was not right or proper that the court, in the exercise of its discretion, should enjoin the corporation against further continuing the nuisance which they are causing. Counsel for the corporation, in the course of his argument before us on this point, said that he was prepared, if necessary, to contend that no injunction should ever be granted against a local authority by reason of the public services which it is their duty to render. If this contention were to be accepted, the result would be to confer on local authorities a privilege which is enjoyed by no other section of the community, and which, so far as I am aware, has never been accorded by the courts to any person or body of persons since the equitable remedy of injunction was devised. For my part, I am quite unable to accept the contention, and can find no possible warrant for it. Anyone who creates an actionable nuisance is a wrongdoer, and the court will *prima facie* restrain him from persisting in his activities. If special circumstances be shown, the court may leave the injured party to his remedy in damages, but, in my judgment, the mere fact, in itself, that the wrongdoer is a local authority (however important) has never been, and ought not now to be, regarded as a circumstance of this character. Local authorities have great and important duties to discharge, and the court, in deciding what order it should make, would, undoubtedly, take those duties into consideration, and would no more make an order that was virtually impossible for an authority

to perform than it would order a private individual to perform an act which it was not in his power to do. Accordingly, it would be quite wrong in the present case to grant an injunction against the Derby Corporation which was to take immediate effect, nor have the plaintiffs ever suggested that such an order should be made. Why, however, no injunction should be granted at all—with the result that the plaintiffs would be compelled to bring one action after another for damages in the future—I am wholly at a loss to see. The proper course to adopt (and one which has been adopted on innumerable occasions in the past) is that which was taken by HARMAN, J., and which my Lord has indicated, namely, to grant an injunction, but to suspend its operation for a reasonable time with liberty to the defendants to apply for a further suspension in the event of circumstances rendering it necessary for such an application to be made. It would be as well, however, for the members of the corporation to bear very clearly in their minds that a further suspension of the injunction will by no means be granted automatically, but only on their satisfying the judge (and the onus will be wholly on them) that they have in all sincerity done all that is reasonably within their power to remedy the grievous injury which they are inflicting on the plaintiffs, but that, notwithstanding their efforts, they have been unable to comply fully with the order which has been made against them. In my view, therefore, the appeal of the Derby Corporation fails. As to the appeal of the British Electricity Authority, I entirely agree with what the Master of the Rolls has said, and with the order which he has proposed.

*Appeal of Derby Corporation dismissed. Appeal of British Electricity Authority allowed in part.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *E. H. Nichols*, town clerk, Derby (for Derby Corporation); *R. A. Finn* (for British Electricity Authority); *Marchant, Gerrish & Newington* (for the plaintiffs); *Linklaters & Paines* (for British Celanese, Ltd.).

F.G.

### LEEDS ASSIZES

(CASSELS, J.)

Nov. 24, 25, 1952

#### REG. v. POTTER AND ANOTHER

*Criminal Law—Conspiracy—Agreement to do an unlawful act—Payment by third party to debenture holder for support of scheme of arrangement.*

An indictment charged the defendants with conspiracy, the particulars alleging that they conspired together and with one S. to enter into an unlawful, corrupt and secret bargain with S. whereby, in consideration of a firm of chartered accountants guaranteeing the payment to S. of £900 in discharge of his claim for £1,200 as a debenture holder against the R. Co., Ltd., S. agreed to support the scheme offered to the debenture holders of the company whereunder they were to receive 8s. in the £ on their debentures.

HELD: the indictment disclosed an offence known to the law, namely, conspiracy.

MOTION to quash an indictment.

The defendants, Cyril Aubert Potter and Wilfred Burgon Gowers, were charged on an indictment with conspiracy, the particulars being:

“Cyril Aubert Potter and Wilfred Burgon Gowers on divers days



between Mar. 20 and 25, 1949, in the West Riding division of the county of York conspired together and with one John George Saint to enter into an unlawful, corrupt and secret bargain with the said Saint whereby, in consideration of the firm of Wilfred B. Gowers and Co., chartered accountants, guaranteeing the payment to the said Saint of £900 in discharge of his claim for £1,200 as a debenture holder against the Rockingham Plate & Cutlery Co., Ltd., the said Saint agreed to support the scheme offered to the debenture holders of the said company whereunder they were to receive 8s. in the £ on their debentures."

*Veale, Q.C.*, and *R. W. Payne* for the Crown.

*Drabble* for the defendant, Potter.

*G. D. Roberts, Q.C.*, and *Leslie* for the defendant, Gowers.

Before the arraignment of the defendants their counsel moved to quash the indictment.

*Roberts, Q.C.*: The indictment should be quashed because the facts alleged in the particulars do not constitute any offence known to the law. There is no allegation of fraud or dishonesty or an intent to injure anyone or that anyone has been injured or lost money, or that there was an inequitable distribution of the company's assets, or that there was a public mischief or a perversion of public justice or any breach of public morality. It is alleged that a recalcitrant debenture holder was guaranteed an additional 7s. in the £ on his debentures, not from the company's assets but from an outside source, on condition that he agreed to support a scheme whereby all the debenture holders were to agree to a composition of 8s. in the £. It is not suggested that Saint received the money at the expense of any creditor or debenture holder of the company. There has been no prosecution remotely resembling this before. The classifications of conspiracy are set out in ARCHBOLD'S CRIMINAL PLEADING, EVIDENCE AND PRACTICE, 32nd ed., at pp. 1442 et seq. The indictment does not allege either the first or second class, namely, a conspiracy to commit any offence punishable by law or to cheat and defraud. As regards the third class, although there are many dicta in old books and cases to the effect that an agreement to do an unlawful act is a criminal conspiracy (e.g. *Reg. v. Rowlands* (1) where the dicta of LORD CAMPBELL, C.J., are far too wide), modern text-books and writers agree that such an agreement is not a criminal conspiracy unless it is fraudulent or done with intent to injure. The debenture holders could upset the agreement if they did not know of the money paid from the outside source, but an agreement to do merely an unenforceable or void act is not indictable. ARCHBOLD (op. cit.) states it is enough if the acts agreed to be done are wrongful, i.e., amount to a civil wrong, but, as regards the cases cited in support of this proposition, *Reg. v. Warburton* (2) was a case of fraud and in *Rex v. Whitaker* (3), LAWRENCE, J., states that it is clear that where the tort is one of fraud or corruption an agreement to commit it is a crime at common law. Neither tort nor fraud is alleged here. It is alleged that the bargain was corrupt, but it does not say who was the corruptor and who was corrupted. Corruption is largely a creation of statute: see ARCHBOLD, op. cit., pp. 1417-1440; and it is not suggested that there was any agent or any principal or that any agent was corrupted not to do his duty. It may be sought to support the indictment on the basis that a fraudulent preference is alleged in which case the act in fraud of the law is to prevent the distribution of the bankrupt's property

(1) (1851), 16 J.P. 243 ; 17 Q.B. 671.

(2) (1870), 35 J.P. 116; L.R. 1 C.C.R. 274.

(3) 79 J.P. 28; [1914] 3 K.B. 1283.

rateably among all his creditors. A fraudulent preference may not involve moral blame: *Re Patrick & Lyon, Ltd.* (1), and the use of the word "fraudulent" is misleading because fraud is not a necessary ingredient and from the point of view of accuracy the phrase "voidable preference" is to be preferred: see WILLIAMS ON BANKRUPTCY, 16th ed., at p. 361. "Unlawful" has various meanings, but an agreement which is merely unlawful because it is void or unenforceable is not a conspiracy. The word does not mean "indictable": see *Mogul S.S. Co. v. McGregor, Gow & Co.* (2). (He also referred to HARRISON'S LAW OF CONSPIRACY (1924), at p. 96, and STROUD'S JUDICIAL DICTIONARY, 3rd ed., and WHARTON'S LAW LEXICON, 14th ed., at p. 239, sub. tit. "Conspiracy".) The present case clearly does not fall within either ARCHBOLD'S fourth or fifth class and the indictment discloses no offence known to the law.

*Drabble*: The Bankruptcy Acts do not make a fraudulent preference criminal and it is not a common law fraud. If two partners agree inter se to break a contract entered into between themselves and another party, such an agreement is void, but they are not guilty of a tort or a crime. [CASSELS, J., referred to *Mulcahy v. Reg.* (3)]. This agreement was not unlawful save in the sense that it was unenforceable and voidable. (He referred to ROSCOE'S CRIMINAL EVIDENCE, 16th ed., sub. tit. "Conspiracy", and KENNY'S OUTLINES OF CRIMINAL LAW, 16th ed., at pp. 341, 342).

*Veale, Q.C.*: The indictment alleges a conspiracy to do an unlawful act. If the word "fraud" had been used it would have been contended that I had to prove dishonesty as in a charge of false pretences. There is a long line of cases which describe this sort of conduct. *Cockshott v. Bennett* (4) states that such an agreement "is bottomed in fraud, which is a species of immorality". [CASSELS, J.: In that case the debtor entered into the bargain]. *Jackson v. Lomas* (5), *Jackman v. Mitchell* (6), *Knight v. Hunt* (7), *Higgins v. Pitt* (8), *Mare v. Sandford* (9), *McKewan v. Sanderson* (10), *Re Milner. Ex p. Milner* (11) and *Re McHenry* (12) are authorities for describing such an agreement as "a fraud", "a cheat", "bribery", "corrupt", "vicious", and "a matter in which the public are interested". A man who enters into a composition is not to be deceived as the creditors are influenced by the supposition that all of them are to suffer equally. In *Knight v. Hunt* (7) and in *Re Milner* (11) the consideration came from an outside source. Such an agreement is unlawful in the sense of being contrary to law, and it is also wrongful and harmful, and, therefore, a conspiracy as defined by LORD BRAMPTON in *Quinn v. Leatham* (13). It is also an agreement to commit a criminal offence as tending to the public mischief: cf. *Jackman v. Mitchell* (6), *Mare v. Sandford* (9), *Rex v. Bassey* (14) and *Rex v. Porter* (15). It is also an agreement to commit a civil wrong: *Rex v. Whitaker* (16).

(1) [1933] Ch. 786.

(2) (1889), 53 J.P. 709; 23 Q.B.D. 598; *affd.* H.L., 56 J.P. 101; [1892] A.C. 25.

(3) (1868), L.R. 3 H.L. 306.

(4) (1788), 2 Term. Rep. 763.

(5) (1791), 4 Term. Rep. 166.

(6) (1807), 13 Ves. 581.

(7) (1829), 5 Bing. 432.

(8) (1849), 4 Exch. 312.

(9) (1859), 1 Giff. 288.

(10) (1875), L.R. 20 Eq. 65.

(11) (1885), 15 Q.B.D. 605.

(12) [1894] 3 Ch. 365.

(13) 65 J.P. 708; [1901] A.C. 495.

(14) (1931), 22 Cr. App. Rep. 160.

(15) 74 J.P. 159; [1910] 1 K.B. 369.

(16) 79 J.P. 28; [1914] 3 K.B. 1283.

See also RUSSELL ON CRIME, 10th ed., vol. 2, p. 1822.

*Roberts, Q.C.*, replied, and referred to *Rez v. Turner* (1).

*Drabble* replied.

**CASELS, J.:** The court is being asked, before the defendants are arraigned on this indictment, to quash the indictment on the ground that it discloses no offence according to the law. I have listened to arguments on both sides and many authorities have been cited. In my opinion, this indictment does disclose an offence which is known to the law, namely, conspiracy. I, therefore, hold that I cannot accede to the application of the defendants to quash this indictment, and, therefore, the defendants must be arraigned on this indictment.

*The trial proceeded, both defendants pleaded "Not Guilty", and both were acquitted.*

Solicitors: *Solicitor, Board of Trade* (for the Crown); *Irwin Mitchell & Co.*, Sheffield (for the defendant Potter); *Wing, Keer & Bolsover*, Sheffield (for the defendant Gowers).

G.M.S.

(1) (1811), 13 East, 228.

### COURT OF APPEAL

(SINGLETON, BIRKETT AND MORRIS, L.JJ.)

Dec. 16, 1952

PRESCOTT v. LANCASHIRE UNITED TRANSPORT CO., LTD.

*Negligence—Omnibus—Passenger injured while alighting—Omnibus stopping short of request stop—No warning by conductor.*

The plaintiff and her husband were travelling on the defendants' omnibus. The plaintiff's husband told the conductor that they wished to alight at the next request stop, and the conductor rang the bell and told him to wait until the bus stopped. Owing to road works and traffic conditions the bus stopped twenty or twenty-five yards short of the request stop, as the driver was waiting for an oncoming vehicle to pass. Unknown to the driver and conductor, but known to the plaintiff and her husband, it had for some time been customary for other buses to stop for passengers to alight at that point, on account of the road works, and the plaintiff and her husband, assuming that the bus had stopped for them to alight, proceeded to do so. As the plaintiff was alighting, the bus re-started as the road was then clear, and the plaintiff was thrown to the ground and injured. The conductor took no step to warn the plaintiff that the stop had not been reached.

**HELD:** the conductor had been negligent in not warning the plaintiff that the stop had not been reached or in not taking steps to ensure either that she be prevented from alighting or that the bus be prevented from re-starting, and, accordingly, the defendants were liable in damages.

**APPEAL** by the plaintiff, Mrs. Prescott, from an order of His Honour JUDGE RHODES, made at Leigh County Court, on Sept. 19, 1952, whereby he dismissed the plaintiff's claim against the defendants for damages for negligence.

*Pigot* for the plaintiff.

*R. H. Forrest* for the defendants.

**SINGLETON, L.J.:** I will ask MORRIS, L.J., to give the first judgment.

**MORRIS, L.J. :** This is an appeal from the judgment of His Honour JUDGE RHODES given at Leigh County Court in a remitted action in which the plaintiff, Mrs. Prescott, claimed damages against the owners of a motor omnibus in which she was travelling on the evening of Dec. 16, 1950. The plaintiff was with her husband, and they intended to alight at a stop in Church Street almost opposite to the Manor Arms Hotel. Owing to certain work which was being done in Church Street there were obstructions in the road, and those obstructions were marked by red lights. The bus was a single-decker bus, and it was full; the conductor said that all the seats were occupied and that five or eight people were standing. The bus was of the kind access to which, and egress from which, is by means of a door near the front. The case for the plaintiff was that, a signal to stop having been given, the bus did stop; that the plaintiff's husband alighted and did so in safety; and that the plaintiff was proceeding to follow her husband when the bus re-started and she was thrown to the ground and received injuries. Because of the work that was being done in Church Street, it had happened that buses approaching the stop almost opposite the Manor Arms Hotel had over a period of time stopped somewhat short of the official stopping place. That circumstance was known to the plaintiff and to her husband. It was, however, in fact, not known to the driver and the conductor on this particular bus.

It was the case for the defendants that the bus never stopped at all. It was said that the bus slowed down and was being driven at a very moderate speed, described as a crawl, but that it never came to a stop. That was a very important issue on the facts, and the learned judge resolved that issue by deciding that the bus did stop. There is no doubt that what happened was that the plaintiff's husband intimated that he and his wife wished to alight at the stop opposite the Manor Arms Hotel, and so informed the conductor. The conductor said in his evidence that after leaving the Red Lion, which was the last stop, he closed the door, and then he said that the plaintiff's husband told him that he was wanting to get off at the next stop, and the conductor said, "I rang the bell and told him to wait until the bus stopped." On the judge's findings, there is no doubt as to what did happen, and it was a most unfortunate occurrence. Because of the work that was being done on the road, and because of the obstruction, it was not possible, or not desirable, for two vehicles to pass at a certain place. As the driver of the bus proceeded in the direction of the Manor Arms Hotel stop, some vehicle approached him and he, doubtless very wisely, thought it better to give way to the other vehicle, and in the result he stopped, and he stopped at a point some twenty to twenty-five yards from the official stop, and according to the plaintiff's husband when he stopped he was right into the kerb. In fact, he had stopped because of the oncoming vehicle, and when the road was clear, without receiving any further bell, he went on and then stopped at the official stop. The driver said that he was not aware of any accident until he was informed when the bus stopped.

It seems to me that once the crucial question of fact is decided as to whether the bus did or did not stop, that then the issue as to liability is made very much clearer in this case. In no sense, in my view, did the plaintiff do anything wrong. She, through her husband, had intimated her desire to get off the bus and asked that the bus should stop at the next stopping place, and she, with her husband, was told by the conductor, who rang the bell at their request, to wait until the bus stopped. The bus did stop; the husband got off; the wife proceeded to do so, not unnaturally; and then the bus proceeded to move on. The conductor, being in a single-decker bus, doubtless had the difficulties that are inevitable when the bus is crowded, but the conductor does not say in his evidence that he



did not know the position of the bus at the time of stopping; he, apparently, did not do anything in the way of calling out. He says that he knew that the door was closed before the bus left the Red Lion because he closed it, and thereafter having heard someone shout "Oh" he saw that the door was open; he, apparently, had not noticed anyone opening the door.

The learned judge, according to the notes of his judgment taken by counsel for both parties, having found very definitely that the bus stopped, went on to say, according to the note of counsel for the plaintiff, as follows: "The bus stopped and the plaintiff's husband made a genuine mistake." By that he means that the plaintiff's husband thought that that was the stop that was being used that day by the bus in lieu of the official stop, because other buses for some time, on account of the work being done, had chosen a stop some yards away from the official stop. The learned judge went on, according to counsel's note:

"I cannot see the driver was in any way to blame. He was entrusting the safety of passengers to the conductor. It was a genuine mistake; the plaintiff has failed to show negligence."

Then he went on to assess damages.

The learned judge does not appear, from the notes of the judgment which are before us, to have dealt with the allegation that there was negligence in the conductor. In my judgment, it is not shown that the driver in these circumstances did anything that he ought not to have done, or omitted to do anything that he should have done; but, in my judgment, it is shown that there was a failure on the part of the conductor. When the conductor said to the plaintiff's husband, "Wait until the bus stops", having been asked to ring the bell, that seemed a very clear invitation to the plaintiff and her husband to alight when the bus did stop. When the bus did stop and when it stopped short of the stopping place, the conductor, in my judgment, ought either to have warned the passengers, or ought to have communicated with the driver in some way. It would be easily possible to inform the driver that passengers were getting off the bus. The conductor ought, in my judgment, to have taken control. The conductor could clearly have seen that the plaintiff's husband had got off the bus. There were others waiting to get off. That could have been seen by the conductor. The plaintiff was following her husband. In my judgment, the conductor ought to have given a warning, or ought to have taken charge of the situation so as to ensure either that the plaintiff should be prevented from getting off the bus or that the bus should be prevented from going on while passengers were in the act of alighting.

We were referred by counsel for the plaintiff to a number of authorities. Many of the cases must depend on their own particular facts. One of the cases to which we were referred is the case of *Mottram v. South Lancashire Transport Co.* (1). In that case:

"The respondent was a passenger on one of the appellants' trolley buses. She was following another passenger off the bus at a request stop, at the time when the conductress was collecting fares on the upper deck of the bus. The other passenger rang the bell once and the bus slowed down, but just as he was getting off, thinking he was acting in the interest of everyone, he rang the bell twice as a signal for the bus to proceed. The respondent proceeded to alight after him, but, the bus picking up speed at that moment, she was thrown to the ground and injured. In an action for damages for such injuries, it was contended that the conductress was negligent in not

(1) [1942] 2 All E.R. 452.

coming to the platform as soon as she heard the bell ring once, so that she might supervise the re-starting of the bus,"

and it was held that there was no negligence on the part of the conductress.

In the course of his judgment, GODDARD, L.J., said this ([1942] 2 All E.R. 453):

"After the man had given the signal for the bus to stop, and if the bus had stopped, it would have been the duty of the conductress to see that no one else was getting off before giving the signal for the bus to start again. In this case the bus never did stop. Before it could stop, the officious passenger gave the signal for the bus to start again."

On the facts in the present case, once the bus did stop the plaintiff was acting quite properly in alighting; she was alighting pursuant to the invitation of the conductor to alight when the bus stopped, and the conductor should thereafter have seen what was happening. He should have given some warning; he should so have directed and controlled the whole situation that the bus would not proceed to move off while another passenger was alighting from it.

I consider, therefore, that on the finding of the learned judge the result should have followed that there was liability in the defendants, and that there should have been judgment against the defendants for the amount of the damages assessed by the learned judge.

**BIRKETT, L.J.** : I am of the same opinion and have nothing to add.

**SINGLETON, L.J.** : I agree.

*Appeal allowed.*

Solicitors : *Gregory, Rowcliffe & Co.*, agents for *Frank Platt, Wigan* (for the plaintiff); *William Charles Crocker*, agent for *T. R. Dootson, Leigh* (for the defendants).

G.F.L.B.

## COURT OF CRIMINAL APPEAL

LORD GODDARD, C.J., HILBERY and HALLETT, JJ.

Dec. 17, 1952

REG. v. ROGERS

*Criminal Law—Sentence—Corrective training—Preventive detention—Supervision order—Convictions on "previous occasions"—Need of separate convictions at separate courts—Criminal Justice Act, 1948 (11 and 12 Geo. 6, c. 58), s. 21 (1) (b), s. 21 (2) (b), s. 22 (1) (a).*

*Criminal Law—Sentence—Supervision order—Order omitted by court of trial per incuriam—Powers of Court of Criminal Appeal.*

Section 21 (2) (b) of the Criminal Justice Act, 1948, provides that, before a sentence of preventive detention can be passed, it must be proved that the offender has been "convicted on indictment on at least three previous occasions" of certain offences. The "previous occasions" therein referred to relate to separate convictions, each at a separate assizes or quarter sessions, and the similar words in s. 21 (1) (b), which relates to corrective training, and in s. 22 (1) (a), which relates to supervision orders, must receive the same construction. Summary convictions are convictions on separate occasions if they take place at sittings of a court of summary jurisdiction on different days.

Where a supervision order under s. 22 (1) has been omitted by the court of trial

per incuriam the Court of Criminal Appeal may alter the sentence so as to include such an order, whether the appeal is against conviction or sentence.

#### APPEAL against sentence.

The appellant was convicted at Dorset Assizes on charges of housebreaking and larceny and received consecutive sentences amounting to eight years' imprisonment. Notice under s. 23 of the Criminal Justice Act, 1948, had been served on the appellant with a view to qualifying him for a sentence of preventive detention. Of the three convictions set out therein one was at Wiltshire Quarter Sessions and the other two were on two counts of the same indictment at Dorset Quarter Sessions on the same day. The deputy chairman was not satisfied that the appellant had been "convicted on indictment on at least three previous occasions" within the meaning of s. 21 (2) (b) of the Criminal Justice Act, 1948, and held that he had no jurisdiction to pass a sentence of preventive detention.

*Elam* for the appellant.

*Buzzard* for the Crown.

The following judgment of the court was delivered by

**LORD GODDARD, C.J. :** The appellant was convicted at Dorset Quarter Sessions of housebreaking and larceny, and, he being a man with a very bad record and it being shown that he was really incorrigible (because on the very day he had been put on probation he committed the offences for which he was before the quarter sessions) he was regarded as a very fit person for preventive detention, but the learned deputy chairman saw a difficulty because the three previous convictions, notice of which had been served on him, consisted of a conviction at Wiltshire Quarter Sessions and two convictions before the Dorset Sessions which took place at the same sessions on the same day. The learned deputy chairman said that he was not satisfied that he had jurisdiction to pass a sentence of preventive detention because the Criminal Justice Act, 1948, s. 21 (2) (b), provides that, before that can be done, the offender must have "been convicted on indictment on at least three previous occasions", and there had not been such three previous convictions unless the two convictions that took place at Dorset Sessions on the same day, which were on two counts of the same indictment, could be regarded as two separate occasions.

The court gave leave to appeal because, though we had no doubt that the sentence which the sessions passed (a sentence of eight years' imprisonment in the aggregate) was in the circumstances right in point of time, it was obvious that a matter of great importance was raised because these circumstances might easily arise again at any assizes or quarter sessions, and, therefore, we gave leave to appeal so that we could consider what is the meaning of the words "at least three previous occasions". Do they mean at least three separate appearances before a court, or do they mean three different convictions of which separate records of conviction can be drawn up? In other words, if a man has appeared before, let us say, the Central Criminal Court in the January sessions and has there pleaded Guilty either to an indictment containing three counts or to three separate indictments all at the same sessions, has he been convicted on three previous occasions so that, if he subsequently commits an offence, he can be sent to preventive detention?

The Criminal Justice Act, 1948, uses practically the same expression in two other places—in s. 21 (1) (b) and in s. 22 (1) (a). Section 21 (1) deals with corrective training, and provides, among other things, that an offender must have been convicted "on at least two previous occasions . . . of offences

punishable on indictment with [a sentence of imprisonment]", but on those occasions he need not have been convicted on indictment. Section 22 (1) provides:

"Where a person is convicted on indictment of an offence punishable with imprisonment for a term of two years or more and that person—  
(a) has been convicted on at least two previous occasions of offences for which he was sentenced to Borstal training or imprisonment . . ."

an order under that section shall be made requiring him to report when he comes out of prison. So there are at least three places where the words "previous occasions" are used, and, in the opinion of the court, the same interpretation must be put on those words where they appear in s. 21 (1) (b), relating to corrective training, and in s. 22 (1) (a), relating to notice to report, as the court puts on them in regard to s. 21 (2) (b), dealing with preventive detention. It is obvious that where an expression like "previous occasions" is used twice in one section and once in the following section, the same construction must be put on it.

The object of preventive detention is the protection of the public by keeping an offender who is liable to it in detention for a long period. If a person is sentenced at assizes for two or three offences, the court always aggregates those offences, and says in effect either: "You will have five years on count 1 and three years on count 2 concurrent, in which case you will serve five years", or, if it does not think that is sufficient: "You will have five years on the first count and three years on the second count consecutive, which means you will serve eight years". Is it, therefore, to be said that when he is sentenced to five years and to three years, he is being sentenced on two separate occasions, whereas if he is sentenced to five years alone he is being sentenced on one occasion only? The point is that if it is shown that the sentences he has received at one court and then at two other courts have not deterred him from committing crime, he is to be liable to preventive detention.

Therefore, the court is of opinion that we must construe these words "on at least three [or "two"] previous occasions", as meaning that each occasion is a separate occasion, that is to say, the convictions referred to are convictions at different sessions or assizes, and two or more convictions at the same sessions or assizes will not rank as separate occasions. I think that, on the whole, that is giving effect to the intention of the Act.

The only difference with regard to the provision relating to corrective training in s. 21 (1) (b) is that in that case summary convictions count if they are of offences which would be punishable on indictment with imprisonment for a term of two years or more. In our view, there is a conviction on a separate occasion on each occasion when a court of summary jurisdiction adjudicates on an information. If the offender is dealt with for two offences in, say, the month of April, he will only have been convicted on one occasion if that has been done at the same court, but if he has appeared on separate informations twice in the same month, but at courts held at an interval, he will then be convicted on two occasions. For these reasons we think that the learned deputy chairman was right in holding that the appellant was not eligible for preventive detention, and we see no reason to alter the sentence.

The only other thing I have to say is that we mentioned in giving leave to appeal that the deputy chairman had not said in passing sentence that there would be an order for supervision under s. 22 (1). That matter has been considered in this court before now. Where it appears, when a case comes up on appeal, that an order has not been made *per incuriam*, we find no difficulty



in saying that the sentence will be altered to that extent. In this case, the appellant has leave to appeal against sentence and so clearly we can do this, but in a case where an appellant has not appealed against sentence we have called attention to the fact that the order can be made because the statute is mandatory that the order shall be made unless, having regard to the circumstances, the court refrains from making it. I think also we may say that, if, when the governor of the gaol receives the prisoner in custody on the signing of the calendar by the judge or on the return signed by the clerk of the peace, he finds, in a case in which the section would operate, that an order has not been made, there is no objection to his applying to the clerk of assize or the clerk of the peace to find out whether the order has not been made *per incuriam*—whether it was omitted because the court forgot to make it or the clerk of the peace forgot to record it. The governor is entitled to call the court's attention to it.

*Appeal dismissed.*

Solicitors: *Registrar of Court of Criminal Appeal; Director of Public Prosecutions.*

T.R.F.B.

#### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON and PEARSON, JJ.)

Jan. 14, 1953

CLARKE v. CHERRY

*Road Traffic—Goods vehicle—"C" licence—"Goods"—Carriage of tools of trade—Window cleaner's equipment—Road and Rail Traffic Act, 1933 (23 and 24 Geo. 5, c. 33), s. 1 (1) (b), s. 36 (1).*

By s. 1 (2) of the Road and Rail Traffic Act, 1933, a goods vehicle is "a motor vehicle constructed or adapted for use for the carriage of goods". By s. 36 (1): "'Goods' includes goods or burden of any description."

The respondent, a window cleaner, used on a road a van, in respect of which he did not hold a "C" licence, for the purposes of his trade. The van carried buckets, washing cloths and leathers, and it was adapted so that it could carry ladders, attached to a permanent fixture, on the top. The respondent was charged with having unlawfully used the van in connection with a trade or business carried on by him without a licence, contrary to s. 1 (1) (b) of the Act. The justices, being of opinion that the articles carried in the van were exclusively tools of trade and not goods carried for sale, held that the van was not being used for the carriage of "goods for or in connection with any trade or business" within the meaning of s. 1 (1) (b), and they dismissed the information.

*Held*, that, as the Act did not define goods as goods carried for sale and in view of the terms of s. 36 (1), the van was a goods vehicle used for the carriage of goods in connection with a trade or business carried on by the respondent, and the case must be remitted to the justices with a direction to find the offence proved.

CASE STATED by Lincolnshire (Parts of Kesteven) justices.

At a court of summary jurisdiction sitting at Sleaford on Aug. 18, 1952, the appellant, Cecil Clarke, a police officer, preferred an information against the respondent, Arthur Herbert Ernest Cherry, charging that, on May 27, 1952, contrary to s. 1 (1) (b) of the Road and Rail Traffic Act, 1933, he unlawfully used a goods vehicle, namely, a motor van, for the carriage of goods for or in connection with a certain trade or business carried on by him, otherwise than under a licence granted under Part I of the Road and Rail Traffic Act, 1933. It was proved or admitted that the respondent, who was engaged in the trade or business of a window cleaner, was the owner of a motor van. On May 27, 1952, he was using the motor van at High Street, Martin, in connection with his trade

or business, it having been adapted by the addition of a permanent fixture to carry ladders used in connection with the trade or business. Buckets, washing cloths and leathers, also used in connection with the trade or business, were being carried inside the motor van, and on the top thereof two ladders were carried, attached to the fixture. He was not in possession of a carrier's licence as required by s. 1 (1) (b) of the Act.

It was contended on the part of the appellant that the motor van was a goods vehicle as defined by s. 1 (2) of the Act, that it was being used for or in connection with a trade or business carried on by the person using it, and that, therefore, the respondent was guilty of an offence under s. 1 (1) (b). It was contended on behalf of the respondent that the ladders, buckets and other articles could not be classed as "goods" because they were not for sale, and, consequently, it was not necessary that the respondent should be in possession of a carrier's licence. The justices dismissed the information and the appellant appealed.

*Swanwick* for the appellant.

The respondent did not appear.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Lincoln before whom the respondent, who carries on business as a window cleaner, was charged with unlawfully using a goods vehicle for the carriage of goods for or in connection with a certain trade or business carried on by him otherwise than under a licence granted under Part I of the Road and Rail Traffic Act, 1933. The respondent has a Jowett van which he uses for carrying his buckets, washing cloths and leathers, and, in addition to that, he has placed a fixture on the roof of the van so that he can carry two ladders on it. The justices dismissed the information because they found that the motor van was used exclusively for carrying the tools of the respondent's trade and not goods carried for sale, and so they held that the motor van was not being used for the carriage of goods for or in connection with any trade or business within the meaning of the Road and Rail Traffic Act, 1933, s. 1 (1) (b).

I am not surprised that the justices tried to find a way to avoid a conviction in a case of this sort, but I am afraid that they cannot do it by reading into the statute words which are not there. The statute does not say anything about the goods carried being goods for sale. It says (s. 36 (1)) : " 'Goods' includes goods or burden of any description ", and it would seem that buckets, washing leathers, and ladders are goods within that definition. Section 1 (1) provides:

" Subject to the provisions of this Part of this Act, no person shall use a goods vehicle on a road for the carriage of goods—(a) for hire or reward; or (b) for or in connection with any trade or business carried on by him, except under a licence."

And, under s. 1 (2), a goods vehicle means a motor vehicle constructed or adapted for use for the carriage of goods. The respondent, therefore, required a C licence to entitle him to carry goods for or in connection with any trade or business carried on by him. The case must go back to the justices with an intimation that an offence within s. 1 (1) (b) has been committed, but, of course, it is open to them to give a conditional discharge to the respondent if they think it right to do so.

**CROOM-JOHNSON, J.:** I agree, and for the same reasons.

**PEARSON, J.:** I agree.

*Appeal allowed.*

Solicitors: *Cunliffe & Airy*, agents for *Ernest H. Godson & Co.*, Sleaford (for the appellant). T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON and PEARSON, JJ.)

Jan. 15, 1953

FLOYD v. BUSH

*Road Traffic—Driving uninsured vehicle—Driving without licence—"Motor vehicle"—Pedal cycle fitted with auxiliary engine—Use at material time as pedal cycle—No removal of essential parts—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 1, s. 4 (1), s. 35 (1).*

At the material time the respondent was riding as a pedal cycle a dual purpose vehicle, namely, a pedal cycle fitted with an auxiliary motor which was in efficient order, but was not actually operating. Justices dismissed informations charging the respondent (i) with using on a road an uninsured motor vehicle, contrary to s. 35 (1) of the Road Traffic Act, 1930, and (ii) with using on a road a motor vehicle, not being the holder of a licence, contrary to s. 4 of the Act, being of opinion that, in view of the way in which the vehicle was being used at the material time, it was not a mechanically propelled vehicle within the meaning of s. 1 of the Act.

*Held*, that, as the motor was in efficient order, the vehicle was a "motor vehicle" within the meaning of the Act, and that the case must be remitted to the justices with a direction to convict on all the informations.

*Lawrence v. Howlett* (1952) (116 J.P. 391), distinguished.

CASE STATED by Lancashire justices.

At a court of summary jurisdiction sitting at Liverpool the appellant, Robert Cecil Floyd, preferred informations against the respondent, Charles Robin Bush, charging that he (i) did use a motor vehicle on a road without there being in force in relation to the user of the vehicle by him a policy of insurance in respect of third-party risks, contrary to s. 35 (1) of the Road Traffic Act, 1930; (ii) did drive a motor vehicle without holding a licence, contrary to s. 4 (1) of the Act; (iii) did take and drive away a motor assisted pedal cycle without the consent of the owner, contrary to s. 28 (1) of the Act.

It was proved that the respondent took and rode away a motor assisted pedal cycle without the owner's consent, that he held no driving licence, and that he had no policy of insurance covering the cycle. It was also proved that he made no attempt to start or to use the engine of the cycle, but pedalled it along the highway for a mile and a half. It was contended on behalf of the appellant that the cycle was a "motor vehicle" within s. 1 of the Act and that *Lawrence v. Howlett* (1) could be distinguished. On behalf of the respondent it was contended that the cycle was not a "motor vehicle" within the Act and that *Lawrence v. Howlett* (1) applied. The justices, being of the opinion that, in view of the way in which the cycle was being used at the material time, it was not a mechanically propelled vehicle within the meaning of s. 1 of the Act, dismissed the informations.

*Nicklin* for the appellant.

*Pain* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Lancaster before whom the respondent was charged with three offences. The vehicle in question is one of those bicycles which have an auxiliary motor fitted to them so that they can be used either as a motor cycle or as a pedal cycle. The respondent had taken away this cycle without the consent of the owner, and when he was stopped he was pedalling it. Apparently, he had pedalled it for a mile and a half, but he had not started the motor. The justices, having considered *Lawrence v. Howlett* (1), were of opinion "that the said motor

(1) 116 J.P. 391; [1952] 2 All E.R. 74.

assisted pedal cycle, as being used at the material time, was not a mechanically propelled vehicle within the meaning of s. 1 of the Road Traffic Act, 1930", and they dismissed the informations.

In my opinion, they were wrong in so doing. I do not think they thoroughly appreciated the decision in *Lawrence v. Howlett* (1). That case gave this court considerable trouble. We came to our conclusion with some hesitation, and GORMAN, J., in his judgment, said it was an exceptional case and must not in any way be extended beyond its particular facts. That case also was concerned with one of these dual purpose vehicles, but the motor had been dismantled and

"... certain vital parts, namely, the cylinder, piston and connecting rod, had been removed by the appellant, though there was some petrol in the tank."

In other words, he dismantled his motor so that, in the opinion of the court, it was no longer a mechanically propelled vehicle, that is to say, a vehicle which was capable of being propelled by mechanical power. But in the present case I think we are bound to assume from the way the Case is stated that this was a cycle in which the auxiliary motor was in working order. We are entitled to assume that because the justices appear to have applied their minds, not to the question whether the vehicle could have been mechanically propelled, as it obviously could have been, but to whether at the moment when the respondent was stopped he was using it as a motor cycle or, as they put it, as a pedal cycle. The definition of motor cycles in the Road Traffic Act, 1930, s. 2 (1) (f), is

"... mechanically propelled vehicles ... with less than four wheels and the weight of which unladen does not exceed eight hundredweight."

I think the only sensible construction of "mechanically propelled vehicles" is vehicles constructed so that they can be mechanically propelled, and I think it would be going far beyond *Lawrence v. Howlett* (1) if we were to hold that one of these vehicles, when possessing an efficient motor, was not a mechanically propelled vehicle.

For these reasons, I think that *Lawrence v. Howlett* (1) does not apply. I would also call attention to the fact that this court decided in *Shimmell v. Fisher* (2), that any movement of a car without the consent of the owner is enough to bring the person who moves it within the ambit of s. 28 (1), which makes it an offence to take and drive away a motor vehicle without the consent of the owner. It does not matter whether he drives it for one hundred yards or for miles. If he is driving the car, that is to say, causing the car to be moved without the consent of the owner, he is committing an offence. It may be that in certain cases, if he was prosecuted for doing it, the justices would say it was a trivial matter and would give an absolute discharge, but that is not the sort of case we are dealing with here. Here is a man who, without any right, has taken a vehicle capable of being used as a motor cycle and equipped to be used as a motor cycle without the consent of the owner. He has driven it along the road, and I say he has driven it because he caused it to move, and whether he caused it to move by pedalling or starting the motor seems to me to be immaterial. At the material time the vehicle was provided with a motor and could be used as a motor cycle. For these reasons, I think the case must go back to the justices with an intimation that all three offences have been proved.

**CROOM-JOHNSON, J.:** I agree. There is no finding by the justices that this vehicle had in any sense ceased to have the engine by which it could be

(1) 116 J.P. 391; [1952] 2 All E.R. 74.

(2) 115 J.P. 526; [1951] 2 All E.R. 672.



mechanically propelled still in existence. The justices seem to have become confused by considering the particular use to which the vehicle was being put by the alternative method of propulsion and to have thought that, on that being shown, the machine ceased to be a mechanically propelled vehicle. Speaking for myself, but for the decision to which the justices have come, I should have thought this was a self-evident case.

PEARSON, J.: I agree.

*Case remitted.*

Solicitors: Norton, Rose, Greenwell & Co., agents for Sir Robert Adcock, clerk of the county council, Preston (for the appellant); Helder, Roberts & Co., agents for John A. Behn, Twyford & Reece, Liverpool (for the respondent).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON and PEARSON, J.J.)

Jan. 16, 1953

#### CARPENTER v. CAMPBELL AND ANOTHER

*Road Traffic—Unlicensed vehicle—Driver as well as owner prosecuted—"Oppressive and undesirable".*

Where an offence is committed either under the Road and Rail Traffic Act, 1933, or the Vehicles (Excise) Act, 1949, by reason of a motor vehicle being used at a time when it is not properly licensed, the owner alone should be prosecuted. It is oppressive and undesirable to prosecute the driver also when he is the employee of the owner and in no way responsible for the licensing of the vehicle.

CASE STATED by Devon justices.

At a court of summary jurisdiction sitting at Honiton on July 9, 1952, the appellant, William John Carpenter, preferred an information against the first respondent, James Campbell, that he did use a goods vehicle without the appropriate licence, contrary to s. 13 (1) of the Vehicles (Excise) Act, 1949, and two further informations against the second respondents, C. D. L. Construction Co., Ltd., (i) that they did use the same vehicle without a proper licence contrary to s. 13 (1) of the Vehicles (Excise) Act, 1949, and (ii) that they did use the said vehicle for the carriage of goods in connection with a business carried on by them without a licence granted under Part I of the Road and Rail Traffic Act, 1933, contrary to s. 1 (1) of that Act.

It was proved or admitted that the second respondents were the owners of goods vehicles, namely, a lorry and a flat-bottomed four-wheeled trailer attached, which, on Apr. 7, 1952, were each laden, the lorry with a compressor, timber and rubber hose and the trailer with another compressor, two pneumatic drills, and rubber air hose, none of which was built in or permanently attached to the trailer; that there was exhibited in the lorry a road fund C licence showing that the sum of £35 had been paid, being the appropriate duty payable in respect of the lorry; that the first respondent was an employee of the second respondents and was engaged as a driver in charge of the lorry and trailer; that the second respondents were under contract with the Post Office authorities to lay telephone cables, which necessitated breaking up the highway and thereafter filling in and leaving the same in a safe state, and that the load on the trailer was being conveyed from Honiton, where the second respondents were engaged

in laying cables, to Axminster for similar works; and that the compressor, pneumatic drills, and rubber air hose on the trailer were used to dig trenches for the purpose of laying the cables.

It was contended on behalf of the appellant (i) that the road fund C licence exhibited in the lorry did not cover the trailer attached thereto, the appropriate duty being £35 for the lorry and £15 for the trailer, and (ii) that the trailer was used for a purpose other than in connection with the construction, maintenance, or repair of roads in that it was not properly constructed for such purpose and was not licensed. It was contended on behalf of the respondents (i) that the first respondent was the servant and acting under the directions of the second respondents, and (ii) that the second respondents could rely on the Road and Rail Traffic Act (Exemption) Regulations, 1951 (S.I., 1951, No. 1641), reg. 2 (e), on the ground that the trailer was carrying goods used for the breaking up of the road and thereafter for the "construction . . . or repair of roads", so that no licence was required, and, further, that the Vehicles (Excise) Act, 1949, s. 7 (1) (h), relating to the conveyance of road construction machinery applied, and that no additional duty was payable. The justices dismissed the informations.

*W. M. F. Hudson* for the appellant.

The respondents did not appear.

**LORD GODDARD, C.J.:** This case must go back to the justices with an intimation that their decision was wrong, and that it is their duty to convict on both summonses, but the court desires to express its strong disapproval that for an offence of this sort the lorry driver was summoned. The duty to take out the proper licences in respect of vehicles is the duty of the employers, who own the vehicles. This is a well-known company engaged in construction work for the Post Office, and, whether by accident or design, they had not taken out the proper licences, and so made themselves liable to certain excise penalties, but what possible reason—good, bad or indifferent—there was for summoning the lorry driver, I cannot conceive. To multiply summonses in this way and to serve them on the driver, who is no more responsible for the fact that the licence has not been taken out than I am, is an abuse and it is oppressive, and, although we cannot say that, within the technical words, he did not "use" the vehicle, it is most undesirable that he should have been summoned. In sending this case back to the justices to convict the company, we are going to direct them to give an absolute discharge to the driver, and I hope that persons who are responsible for these prosecutions will not in similar cases multiply summonses in this way, but will serve the persons responsible and not persons who are not responsible. To indicate our disapproval of what has been done we shall not grant any costs in this case.

**CROOM-JOHNSON, J.:** I agree.

**PEARSON, J.:** I agree.

*Appeal allowed.*

Solicitors: *Wontner & Sons*, agents for the *County Prosecuting Solicitor for Devon* (for the appellant).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 16, 1953

SPICER v. WARBEY

*Magistrates—Case Stated—Need to submit draft Case to respondent—Application by respondent for amendment to be made without delay and supported by affidavit.*

Where a draft Case has been preferred by the appellant for statement by justices there is no obligation on the clerk to the justices to submit it to the respondent if the justices are satisfied that the facts are fully stated in accordance with their findings. If the respondent is of opinion that the facts found have not been properly stated in the Case, it is his duty to make an application to the Divisional Court, supported by affidavit, without delay, for the Case to be sent back to the justices for amendment.

CASE STATED by Hertfordshire justices.

On July 7, 1952, at a court of summary jurisdiction sitting at Hatfield, an information was preferred by the appellant, a superintendent of police, charging the respondent with an offence against the Road Traffic Act, 1930, s. 11 (1), in that, on May 10, 1952, he drove a motor vehicle in Hatfield in a manner dangerous to the public. The justices dismissed the information, and, on Sept. 22, 1952, on an application by the appellant, stated a Case, a copy of which was received by the respondent on Sept. 30, 1952. At the hearing of the Case, the respondent complained that certain facts had been omitted from it.

*R. M. O. Havers* for the appellant.

*H. H. V. Forbes* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Hertford before whom the respondent was charged with driving a motor vehicle in Green Lanes, Hatfield, on May 10, 1952, in a manner dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1). The information was heard and dismissed on July 7, 1952, and the Case was stated on Sept. 22, 1952. Counsel for the respondent now complains that the Case is not properly stated. He says that the clerk to the justices asked the prosecution to draft the Case and did not submit the draft to the respondent for revision. I do not think that there was any obligation on the clerk to submit the draft to the respondent, although it is done in many cases. If the justices see that the facts are properly and fully stated in accordance with their findings, I do not think that any further revision of the Case is necessary.

If, however, a respondent thinks that certain facts found by the justices—and not merely evidence which was submitted to them—have been omitted from the Case, he can apply to this court for a re-statement of the Case on stating in an affidavit the findings of fact which, in his opinion, have been omitted. The court will then consider whether it should send the Case back to the justices, asking them to re-state it if the facts, which are alleged to have been found by them and omitted from the Case, were, in fact, found by them. But a copy of this Case has been in the possession of the respondent or his advisers since Sept. 30, 1952, and there has been no affidavit by him alleging that any fact found by the justices has not been stated in the Case. We are concerned, not with the evidence given in the case, but with the facts found by the justices, and, unless we are satisfied that the justices did find, or must have found, certain facts which they have not put into the Case, we should not send it back to them for amendment.

As the Case has been in the hands of the respondent's advisers all these months, we cannot now send it back to the justices for amendment merely on a statement on behalf of the respondent that certain facts have been omitted. It was the respondent's duty to act promptly in the matter, and, in the circumstances, the court will not send the Case back for amendment. [After reviewing the facts found by the justices, His LORDSHIP held that their finding that the respondent was not guilty of dangerous driving was a perverse finding which the court would not support, and that the Case should be remitted to the justices with an intimation that, on the facts found by them, it was their duty to convict the respondent.]

**CROOM-JOHNSON, J., and PEARSON, J., concurred.**

*Appeal allowed.*

Solicitors: *Pothecary & Barratt*, agents for *T. Ottaway & Son*, St. Albans (for the appellant); *N. G. Maclean* (for the respondent). T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, J.J.)

Jan. 19, 1953

#### CARNILL v. EDWARDS AND OTHERS

*Vagrancy—Prostitute—Wandering in public highway—Indecent behaviour in parked motor-car—Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3.*

A man who was driving a motor-car in the centre of Sheffield picked up two prostitutes and drove them to some waste land off a lane on the outskirts of the city. There he stopped the car and indecent conduct between him and the women took place in the car. Informations charging the two prostitutes with wandering in a public highway and behaving in an indecent manner were dismissed by the justices.

**HELD:** that the dismissal was right, as at the time when the indecent conduct took place the prostitutes, being in the car, could not be said to be wandering in a public highway.

**CASE STATED** by Sheffield justices.

At a court of summary jurisdiction sitting at Sheffield on June 27, 1952, the appellant, George Alfred Carnill, a superintendent of police, preferred an information against the respondents, Eunice Edwards, Renée Craig, and Albert Aldene Bramall, charging that on Apr. 23, 1952, the respondents Edwards and Craig, being common prostitutes wandering in the public highway, behaved in an indecent manner in a public highway, called Claywheels Lane, contrary to s. 3 of the Vagrancy Act, 1824, and that the respondent Bramall on the same day unlawfully aided, abetted, counselled or procured the respondents Edwards and Craig in the commission of the said acts of indecency, contrary to s. 5 of the Summary Jurisdiction Act, 1848.

By the Vagrancy Act, 1824, s. 3:

" . . . every common prostitute wandering in the public streets or public highways, or in any place of public resort, and behaving in a riotous or indecent manner . . . shall be deemed an idle and disorderly person . . . "

It was proved or admitted that Edwards and Craig were common prostitutes. On the evening of Apr. 23, 1952, they got into Bramall's motor car in Cambridge Street, in the centre of Sheffield, and were driven by him to Claywheels Lane, a lane in the suburbs of Sheffield, which was not much frequented at that time of the night, arriving there shortly before 11.20 p.m. There, the respondent Bramall drove the car off the roadway for about six yards to waste land at the



side of the lane. Acts of indecency took place between Bramall and the two female respondents in the motor car. These acts were not observable except by a person who shone a torch on to the motor car, as did the appellant.

It was contended on behalf of the appellant that Edwards and Craig were common prostitutes wandering in a public highway and behaving indecently within the meaning of s. 3 of the Vagrancy Act, 1824, even though, at the material time, they were in a motor vehicle and that Bramall aided and abetted them in the commission of those offences. It was contended on behalf of Edwards and Craig that as, in fact, they had entered the motor car in Cambridge Street and had journeyed direct to Claywheels Lane and the car had then left the lane and stopped on spare land adjacent thereto, the word "wander" (which must be interpreted "rambling here and there"), being an essential part of the charge, could not apply, since the journey was a fixed one throughout and the two respondents had never alighted from the motor car until ordered to do so by the police after the alleged commission of the acts of indecency. The justices dismissed the information and the appellant appealed.

*Leslie* for the appellant.

*Cumming-Bruce* for the respondents.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the city of Sheffield, before whom three people, two prostitutes and a man, were charged under the Vagrancy Act, 1824. The two women, who were common prostitutes, were charged with wandering in Claywheels Lane and committing an indecent act, and the man was charged with aiding and abetting.

In my opinion, the justices came to a proper decision. I cannot see how it can be said, if a woman accepts an invitation and gets into a motor car, that when she gets to her destination, she is wandering in the street. She is not wandering in the street; she is sitting in the motor car. The justices, therefore, seem to have dismissed this case properly, but I am not sure that I follow their grounds. Their finding was:

"We being of opinion that in the circumstances of the case the prostitutes could not be held to be wandering in a specific street within the meaning of s. 3 of the Vagrancy Act, 1824, dismissed the said informations."

If they had said: "We were of opinion that the prostitutes could not be said to be wandering in Claywheels Lane", I should have agreed, because they were not. They were sitting in a motor car in Claywheels Lane. My only doubt was whether the justices thought a woman must wander in a specific street, but I do not think they did because the section talks about a common prostitute wandering "in the public streets or public highways", and it does not matter whether she wanders up and down one street or more than one. What, I think, the justices meant to find, and what commends itself to the court, is that in the case of the specific street mentioned in the information, these women were not wandering at all. For these reasons I think that the justices came to a correct determination in point of law and the appeal must be dismissed with costs.

**CROOM-JOHNSON, J.:** I think the justices have arrived at the right conclusion for the wrong reasons.

**PEARSON, J.:** I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *John Heys*, town clerk, Sheffield (for the appellant); *Jackson & Jackson*, agents for *Irwin Mitchell & Co.*, Sheffield (for the respondents).

T.R.F.B.

## COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 19, 1953

REG. v. MELVIN AND EDEN

*Criminal Law—Verdict—Power of court to substitute—Charges of breaking and entering and receiving—Acquittal on charge of breaking and entering—Conviction of receiving—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 5 (2).*

Where an indictment contains counts for breaking and entering and larceny, and also for receiving, and the jury have returned a verdict of Not Guilty of breaking and entering and larceny and Guilty of receiving, the Court of Criminal Appeal, if they take the view that the verdict of Guilty of receiving cannot stand, has no power under s. 5 (2) of the Criminal Appeal Act, 1907, to substitute a verdict of Guilty of breaking and entering and larceny.

APPEALS against conviction.

The appellants were indicted at the Central Criminal Court before the commissioner for officebreaking and larceny and for receiving stolen property. They were acquitted of officebreaking and larceny and convicted of receiving and were sentenced, Melvin to three years', and Eden to four years', imprisonment.

The police, having been informed of officebreaking and stealing of safes at Ruislip, Middlesex, had gone to a goods yard near King's Cross on a certain evening, and at 10.40 p.m. a lorry entered the yard with the two appellants in it, and a third man who had subsequently failed to surrender to his bail. Three safes were in the lorry, together with housebreaking tools. At the trial the appellants put forward the defence of an alibi for the greater part of the evening, and they accounted for their presence in the lorry by saying that they had been given a lift by the third man. They appealed on the grounds that there was no direction by the commissioner as to receiving, the whole case in the court below having been fought on the ground that it was one of breaking and entering or nothing.

*J. C. G. Burge* for the appellants.

*E. Clarke* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. In the opinion of the court these appeals must succeed. In giving that decision the court gives it with the same reluctance that the court expressed in *Rex v. Evans* (1). We cannot, in fact, distinguish this case from *Rex v. Evans*, which, with all respect, we think was rightly decided.

The difficulty is that the case was put forward to the jury simply as being that the appellants were the persons who had broken into the offices in question and had driven away with the property in possession of which they were found. Their defence was an alibi, certainly not of a very satisfactory character, and, if the jury had believed it, it is difficult to understand how they could even have found the appellants guilty of receiving. But, the case having been presented from first to last as a case in which the appellants were the actual thieves and the learned commissioner having summed up the case exceedingly well and carefully on that footing, for some reason or another the jury came back with a verdict of not guilty of breaking and entering, but guilty of receiving. No one had said anything about receiving from beginning to end. The learned commissioner, in the course of his summing-up, mentioned the charge of receiving, but only to tell the jury to disregard it.

(1) (1916), 85 L.J.K.B. 1176; 114 L.T. 616.

The only question that arises is whether this court has power to substitute a verdict of guilty of breaking and entering and larceny which, if the jury had thought that the appellants were criminals, was the verdict they ought to have found instead of the verdict which they did find. In our opinion, the court has no such power. Section 5 (2) of the Criminal Appeal Act, 1907, provides:

"Where an appellant has been convicted of an offence and the jury could on the indictment have found him guilty of some other offence, and on the finding of the jury it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offence, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury a verdict of guilty of that other offence, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offence, not being a sentence of greater severity."

In our opinion, that sub-section would enable the court, for instance, in a case where a jury have returned a verdict of guilty of obtaining by false pretences and the evidence shows that it really should have been a verdict of guilty of larceny, to substitute the latter verdict for that relating to false pretences, or, if a person has been found guilty of larceny as a bailee, it may be that he ought to have been convicted of fraudulent conversion. In *Rex v. Evans* (1) we find an exactly parallel case to the present case. In that case there was a count for larceny and a count for receiving, and the jury acquitted of larceny, but convicted of receiving. The court said they could not substitute the alternative verdict because that would be to substitute for themselves a verdict which the jury not only refused to find but which was one of acquittal. I think that must be the explanation of the decision in *Rex v. Smith* (2) where the jury returned a verdict of receiving in a case in which the only possible verdict was one of stealing. The prisoner had been seen to steal the goods, and yet the jury found him guilty of receiving. We think that in that case, although LORD HEWART, C.J., referred to a verdict which the jury refused to find, the jury had not found a verdict of not guilty on the larceny count in the indictment. They seem not to have found a verdict on that at all. I suppose they simply came back and said that they found the prisoner guilty of receiving. The court there did substitute a verdict of guilty of larceny.

If we could substitute a verdict in the present case, we should undoubtedly do so because the court cannot feel any doubt as to the guilt of the appellants, but, the jury having returned a verdict of not guilty of larceny and guilty of receiving, we are of opinion that, as the verdict relating to receiving cannot stand, we have no option to take any course but to quash the conviction, although we do so with great reluctance.

*Appeals allowed.*

Solicitors: *Kingsley, Napley & Co.* (for the appellants); *Solicitor, Metropolitan Police* (for the Crown).

T.R.F.B.

(1) (1916), 85 L.J.K.B. 1176; 114 L.T. 616.

(2) (1923), 17 Cr. App. R. 133.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 20, 1953

LLOYD v. SINGLETON

*Road Traffic—Uninsured motor vehicle—Permitting use—Offence capable of being committed by person in charge although not owner—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 35 (1).*

The offence of permitting the use of an uninsured motor vehicle, contrary to s. 35 (1) of the Road Traffic Act, 1930, can be committed by any person who is in charge of the vehicle, although he is not the owner.

Dictum of MACKINNON, L.J., in *Goodbarne v. Buck* ([1940] 1 All E.R. 616) not followed.

CASE STATED by Southport justices.

At a court of summary jurisdiction sitting at Southport the appellant, William Herbert Lloyd, deputy chief constable of Southport, preferred an information against the respondent, Orme Fitzgerald Singleton, charging that on Sept. 9, 1951, the respondent did permit Charles Eric Singleton to use on a road a motor vehicle in relation to the user of which by the said Charles Eric Singleton there was no policy of insurance in force in respect of third-party risks, contrary to the Road Traffic Act, 1930, s. 35 (1).

It was proved or admitted that on the night of Sept. 8/9 the respondent, who was feeling unwell, asked his brother, Charles Eric Singleton, to drive a motor vehicle, JTE 488, from Birkdale to the place where it was usually kept. On that journey the driver was stopped and could not produce a certificate of insurance covering his use of the vehicle. The vehicle was owned by a company called Axforde, Ltd., of which the respondent was the assistant general manager, and on Sept. 8 and 9 there was in force a policy of insurance in the name of Jack Rubin, managing director of Axforde, covering any person driving the vehicle with Rubin's permission. The respondent used the vehicle for his work and drove it with the permission of Rubin. He was in general charge and control of the vehicle, and had full discretion as to its use, provided it was being used in the company's business or by the company's employees. Charles Eric Singleton was not an employee of the company and had not been given permission to drive the car by Rubin.

It was contended on behalf of the appellant that any person who had control of a motor vehicle was in a position to forbid or to permit another person to use the vehicle within the meaning of the Road Traffic Act, 1930, s. 35 (1), and that certain obiter dicta in *Goodbarne v. Buck* (1) did not apply. *Williamson v. O'Keefe* (2) was also cited. On behalf of the respondent it was contended that dicta in *Goodbarne v. Buck* (1) applied. The justices dismissed the information.

*Boydell* for the appellant.

*Binney* for the respondent.

**LORD GODDARD, C.J.:** It is clear that the justices came to a wrong decision, although I can well understand their difficulty because of a passage in a judgment of MACKINNON, L.J., which with I shall deal in a moment.

The charge against the respondent was permitting his brother to use a certain motor vehicle without an insurance policy being in force in relation to that user. The facts found by the justices show that this car belonged to a company

(1) [1940] 1 All E.R. 613; [1940] 1 K.B. 771.

(2) 111 J.P. 175; [1947] 1 All E.R. 307.



called Axfords, Ltd. It was insured by a Mr. Rubin, who was the managing director of Axfords, Ltd. The respondent was the assistant manager, and he was allowed to drive the car on the company's business, and had full discretion as to permitting the use of the car and who was to drive the car so long as it was being used for the business of the company or another company of which Mr. Rubin was also managing director. So long as the car was being used by persons in the employment of the company on the company's business, it was a lawful user which the respondent was entitled to permit, and one which would be covered by the insurance policy. On the night in question the respondent seems to have been taken ill, and he asked his brother, who had nothing to do with the companies, to drive the car home. The brother had no policy of insurance, and Mr. Rubin's policy of insurance would not cover him because he was not employed by the company and was not driving on the service of the company.

The justices dismissed the charge because a dictum of *MACKINNON, L.J.*, in *Goodbarne v. Buck* (1) was cited to them which, it is clear, the learned lord justice uttered per incuriam. It was only a dictum, and obviously he went further than he need have done and was not thinking of the particular circumstances that arose in the present case. In *Goodbarne v. Buck* (1) two brothers were engaged in a very disreputable transaction. W. E. Buck was short of money, and he borrowed some money from his brother, H. A. Buck. H. A. Buck lent his brother the money, no doubt to buy a car, but, when W. E. Buck had bought the car, it was his car and not H. A. Buck's car. W. E. Buck was driving the car and ran over and killed somebody. The dead person's representative sought to recover damages from H. A. Buck on the ground that he had permitted his brother to drive the car which would have been covered by a policy which he, H. A. Buck, had taken out. This policy had been taken out in the name of H. A. Buck when he was not the owner of the car, but W. E. Buck was, and the insurance company repudiated the policy, so the car was wholly uninsured. The reason why H. A. Buck was not liable in that case was because he was not the owner of the car, but his brother, who was driving the car, was the owner, and was driving his own car. Therefore, it could not be said that H. A. Buck was permitting his own brother to drive the car because it was his brother's and he could drive it without any permission. In giving judgment *MACKINNON, L.J.*, said ([1940] 1 All E.R. 616):

"In order to make a person liable for permitting another person to use a motor vehicle, it is obvious that he must be in a position to forbid the other person to use the motor vehicle."

Everybody would agree with that, and, if the learned lord justice had stopped there, no difficulty would have arisen, but he said (*ibid.*):

"As at present advised, I can see no ground on which anybody can be in a position to forbid another person to use a motor vehicle except . . . where the person charged is the owner of the car."

If this had been a reserved judgment, which it was not, no doubt either the learned lord justice or the other members of the court would have pointed out that, of course, the situation can arise which arose here, namely, that the car is entrusted by the owner to a driver authorised by him who has the care, management and control of the car, and that person is entitled to permit certain people to drive but not others. In the present case the respondent was entitled to permit employees of the companies to drive, but he was not entitled to

(1) [1940] 1 All E.R. 613; [1940] 1 K.B. 771.

permit any other persons to do so. In the course of the argument I put the illustration of a man, owning a car and employing a chauffeur, who leaves his car in the care of the chauffeur. If, when the master is not in the car, the chauffeur allows somebody else to drive it, the chauffeur is permitting the use of it. The master is not permitting the use of it because he does not know it is being used. He has given no authority to the chauffeur to allow other people to drive. In the ordinary way he would forbid the chauffeur to allow anybody else to drive, but, whether the chauffeur is actually forbidden or not, he is the person who permits the driving, and that case was not in the lord justice's mind when he uttered the dictum. When giving an *ex tempore* judgment, he did not think of all the various permutations which could arise.

In the present case, though I can well understand that the justices thought they were bound to follow that dictum, the court feels obliged to say that they do not agree with it. They do agree with what he said, that

"In order to make a person liable for permitting another person to use a motor vehicle, it is obvious that he must be in a position to forbid the other person to use the motor vehicle."

In this case it is clear that the respondent was in a position to forbid his brother to drive, but instead of that he requested him to drive. This case must go back to the justices with an intimation that they did not come to a correct determination in point of law, and they must now consider the policy and come to a conclusion whether or not the car was insured.

**CROOM-JOHNSON, J.:** The Road Traffic Act, 1930, s. 35 (1), provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful for any person to use, or to cause or permit any other person to use, a motor vehicle . . ."

which, to put it shortly, is uninsured against third party risks—in this case the respondent did permit somebody else to do this, and the sheet anchor of counsel for the respondent is some of the observations of **MACKINNON, L.J.**, in *Goodbarne v. Buck* (1). Those observations were clearly obiter, and I concur in my Lord's view that they must have crept into that judgment, which is not a reserved judgment, *per incuriam*.

Counsel's other argument is that in this case what was done did not amount to "permission", but he did not convince me. I agree with the judgment which has been proposed by my Lord.

**PEARSON, J.:** I agree.

*Case remitted.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. E. Perrins*, town clerk, Southport (for the appellant); *Hancock & Scott*, agents for *Bellis, Son & Co.*, Southport (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 20, 1953

REG. v. NORFOLK QUARTER SESSIONS. *Ex parte* BRUNSON

*Criminal Law—Committal for trial—Validity—Inadmissible evidence admitted before justices—Indictable Offences Act, 1848 (11 & 12 Vict., c. 42), s. 17.*

A committal for trial is not invalidated by the fact that evidence which was inadmissible or which was given by an incompetent witness was admitted by the examining justices.

*Rex v. Grant* ([1944] 2 All E.R. 311) and *Rex v. Sharrock* (1948) (112 J.P. 162) not approved.

APPLICATION for orders of mandamus and certiorari.

On May 24, 1952, a motor-car, which had been stolen from Army barracks at Colchester earlier in that month, was found at a garage owned by the respondent, Harry Fletcher, near Thetford, Norfolk. The Norfolk police arrested him and also his son, Michael Robert Fletcher, and handed them over to the Essex police in custody. The superintendent of police at Colchester allowed the two men out on bail under s. 22 of the Criminal Justice Administration Act, 1914, and s. 45 of the Criminal Justice Act, 1925, on their entering into recognisances to appear at such times and places as might be required. Later, he gave them notice that their recognisances were at an end and that their further presence at the police station would not be required. Subsequently an information was preferred by the applicant George Brunson, an inspector of the Norfolk police, against the respondent, and he was brought before the examining justices at Methwold. No charge was made against his son, Michael, and the son was called as a witness before the justices. The respondent was committed for trial at Norfolk Quarter Sessions. At the hearing on July 30, 1952, counsel on his behalf submitted that the committal for trial was unlawful because the son was an incompetent witness, since there was still a charge pending against him in respect of the car, and that charge had not been lawfully disposed of. Quarter sessions accepted that submission, quashed the indictment on all counts, and directed that the respondent's costs should be paid out of local funds. The applicant obtained leave to apply for an order of mandamus requiring Norfolk Quarter Sessions to hear and determine the case against the respondent, and for an order of certiorari quashing the order of quarter sessions.

*Howard, Q.C., and F. P. Keysell* for the applicant.

*Head* for the respondent.

*Lionel Thompson* for the justices.

LORD GODDARD, C.J., stated the facts and continued: It is not necessary for us to go into the question whether a charge had been preferred against Michael Fletcher or not, for I am clearly of opinion that no charge had been preferred which made it improper for him to be called as a witness in the case. There was, indeed, no charge. He had been taken into custody and released on bail, and in due course the police told him that he need not surrender, and he did not do so. But this case is one of great importance, because, if, in different circumstances, we had to give effect to this submission and uphold the order of quarter sessions, it would, so far as I can see, mean that, if any inadmissible evidence be given before justices when they are acting as examining justices, that vitiates the committal of the defendant by them. It is true that

a judgment in *Rex v. Grant* (1) given on circuit by BIRKETT, J., when, no doubt, he had not had the opportunity of as full an argument and of cases being cited as we have had, seems to have been to that effect, and his judgment was followed by LEWIS, J., in *Rex v. Sharrock* (2), but consider what it means. If a committal is to be vitiated because an incompetent witness has given evidence, which means that the evidence is wrongly admitted, it would follow that a committal could always be objected to if it could be shown that there was something on the depositions which could not be legally admitted as evidence. That would be very revolutionary. I think that *Rex v. Grant* (1) is, perhaps, to be explained by the fact that BIRKETT, J., strongly disapproved of what had been done in that case and thought that the witnesses who had been called were called in a way that was unfair, or it might have been they were put in the position of having to incriminate themselves. It is interesting to notice that counsel for the applicant has called our attention to the case of *Winsor v. Reginam* (3), in which it was expressly decided by a court of the highest authority—the Exchequer Chamber upholding the decision of the Queen's Bench—that, if two people are indicted together, although it is an undesirable practice—and I have no doubt nowadays it would never be allowed—there was nothing in law to prevent the Crown calling one prisoner as a witness for the Crown though the proceedings against him had not been determined. It may be that the Criminal Evidence Act, 1898, has put difficulties in the way of that case being followed, but we need not consider that, because I am willing to admit for the purposes of this argument that Michael Fletcher should not have been called before the justices and his depositions should not have been taken.

On that assumption, it might well be that at the trial objection could have been taken to his evidence, but the words of the Indictable Offences Act, 1848, s. 17, are:

“ . . . in all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence . . . such justice or justices, before he or they shall commit such accused person . . . for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined . . . ”

That section took the place of statutes which were passed as long ago as the reign of Philip and Mary to regulate the procedure before justices. There were two statutes, one dealing with bailable and the other dealing with non-bailable offences. In those days the duty of a justice when a person appeared before him charged with an offence was, first, to examine the prisoner, which, of course, cannot be done now, and then he reduced what he could obtain from the prisoner into writing. Then, but not in the presence of the prisoner, he examined any witnesses, or, to use the language of the Act, “persons”, who should know the facts and circumstances of the case. Having taken their statements, which were, no doubt, in those days referred to as depositions, but which were not the same as depositions at the present time, the justice sealed them and sent them with a writ of mittimus to be used at the assizes, and one

(1) [1944] 2 All E.R. 311.

(2) 112 J.P. 162; [1948] 1 All E.R. 145.

(3) (1866), 30 J.P. 374; L.R. 1 Q.B. 390.



of the principal pieces of evidence was what the justice had got from the prisoner. Those statutes remained in force until Jervis's Act, the Indictable Offences Act, 1848, which prescribed what was to be done by committing justices. They were to take the depositions in writing, and that had to be done in the presence of the prisoner, who was entitled to cross-examine. If the provisions of that section are not complied with, the committal is bad, and that is what the Court of Criminal Appeal decided in *Rex v. Gee*, *Rex v. Bibby*, *Rex v. Dunscombe* (1) where, instead of taking depositions in the way prescribed by the Act, statements had been obtained from witnesses and they were read over in court. Speaking for myself, I should have thought it would be a very good thing if something like that could be permitted because it would save an enormous amount of time, but it is not permitted, and, as the depositions had not been taken as prescribed by the Act, the court held that the committal was bad. But no court has suggested that, because justices in taking depositions admit some evidence that is not admissible or hear a witness to whom, it turns out, objection could be taken on some point or another, that vitiates the committal. The committal takes the place of the form of presentment by a grand jury, who could hear what evidence they liked or no evidence at all, and now the matter is dealt with by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 2 (1), which makes a committal by justices equivalent to a presentment by grand jury. Therefore, so long as it is shown that justices have acted in accordance with the Indictable Offences Act, 1848, their committal is a good committal. Whether the evidence that has been given before the justices will be admitted at the trial is another matter.

If we gave effect to the argument which has been advanced and did not disapprove of *Rex v. Grant* (2) and *Rex v. Sharrock* (3), it must follow, it seems to me, that any inadmissible evidence given before justices, that is to say, any evidence which the court of trial comes to the conclusion is inadmissible, would vitiate the whole committal. I cannot see the difference between the admission of inadmissible evidence or the admission of the evidence of a witness who is incompetent. During the argument I instanced a case in the Court of Criminal Appeal *Rex v. Boucher* (4) in which a wife had been called to give evidence against her husband on a charge of larceny, and we quashed the conviction on the ground that the evidence of the woman was the evidence of an incompetent witness although no objection had been taken in the court below. She had also given evidence before the justices, but no one had suggested that the committal was bad. In the present case there was no ground on which quarter sessions could properly refuse to try the indictment. Their order quashing the indictment must be quashed as also the order giving costs, and mandamus must go to them to hear and determine the case.

**CROOM-JOHNSON, J.:** I am of the same opinion. If the argument which has been advanced is right and the committal was bad, that does not mean that the prisoner of necessity goes free, for the court in a proper case, where there has been some irregularity, can send the matter back to the justices so that they can hear evidence properly in accordance with the statute. I cannot see that there was anything in any evidence which Michael Fletcher might have given, if called on to give evidence at quarter sessions, which could be said to be inadmissible evidence. What happened when these two people

(1) 100 J.P. 227; [1936] 2 All E.R. 89; [1936] 2 K.B. 442.

(2) [1944] 2 All E.R. 311.

(3) 112 J.P. 162; [1948] 1 All E.R. 145.

(4) (1952), 36 Cr. App. R. 152.

were released by the Essex police cannot in the least affect his competence to give evidence. Whether it was desirable that he should be called to give evidence is a wholly different matter. It is true that a prisoner on trial is not permitted to give evidence as against a fellow prisoner unless it is clearly established that the proceedings against him have come to an end either by his being acquitted or convicted or by his pleading Guilty and being dealt with by the trial tribunal. I am at a loss to understand how in the circumstances this man was in the least incompetent as a witness.

**PEARSON, J.:** I also agree with the judgment proposed, and with the reasons given by my Lord. I would only like to say that, to my mind, the short point here is that it is not shown that there was any infringement in the taking of the depositions of the provisions of the Indictable Offences Act, 1848, s. 17. The requirement there laid down is that the justices shall take the statements on oath or affirmation of those who "know the facts and circumstances of the case". That wording, especially having regard to the history of the section which has been described, seems to me very different from other wording which there might have been—that they should take the evidence of only such witnesses as would be admissible according to the rules of evidence at the trial. This contemplates, to my mind, a much less formal inquiry. The object of the section is that the depositions of those who know the facts and circumstances of the case should be taken, and it is not in the least established here that there was any infringement of that provision. The second observation I want to make is that I thought that the argument of counsel for the respondents might depend to some extent on definite meanings which might be given to the word "charged". In a sense a prisoner may be charged at the moment when a policeman arrests him without warrant on suspicion of felony and there is some obligation to inform the arrested person for what he is being arrested. There may be further action taken by the police at the police station, but it does not follow that what happens at those earlier stages causes the person arrested to be charged in the relevant and material sense, which I should have thought means that an information has been laid against him so that the proceedings against him have at that stage been started. I am not satisfied that he can be said to be charged in any sense material for the purposes of this case until an information has been laid. I agree that the orders should issue.

*Orders of quarter sessions quashing indictment and granting costs, quashed.*

*Order of mandamus issued to quarter sessions to hear and determine the indictment.*

Solicitors: *Ford, Michelmores, Rose & Binning*, agents for *T. E. Rudling & Co.*, Thetford (for the applicant); *Peacock & Goddard*, agents for *Reed, Wayman & Walton*, Downham Market (for the respondents); *Sharpe, Pritchard & Co.*, agents for *H. Oswald Brown*, clerk of the county council, Norwich (for the justices).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON and PEARSON, JJ.)

Jan. 19, 20, 1953

PERRY v. GARNER

*Pests—Destruction—Rats—Notice to owner of land—Validity—“Poison treatment or other work of a not less effectual character”—Prevention of Damage by Pests Act, 1949 (12 and 13 Geo. 6, c. 55), s. 4 (1).*

Justices dismissed an information under s. 5 (2) of the Prevention of Damage by Pests Act, 1949, charging the respondent with failing to take the steps required by a notice under s. 4 (1) of the Act for the destruction of rats on land owned and occupied by him which had been served by the local authority. The notice set out the following steps: “Poison treatment of infested land, such measures to be carried out to the approval of the local authority, or other work, of a not less effectual character, to be executed for the destruction of the rats.”

*Held*, that, as the “other work” had not been particularised, the notice had not required the respondent to take “specified steps” within s. 4 (1), and was, therefore, not a valid notice under the sub-section, and that the prosecution should have failed in limine.

CASE STATED by Buckinghamshire justices.

At a court of summary jurisdiction sitting at Princes Risborough the appellant, John Percival Perry, chief sanitary inspector of the Wycombe Rural District Council, preferred an information against the respondent, Charles Aubrey Garner, charging him that he failed to take the steps set out in a notice served by the rural district council of Wycombe and requiring him, as occupier of certain land, to take such steps as were specified in the notice for the destruction of rats on the land and for keeping the land free from rats, contrary to the Prevention of Damage by Pests Act, 1949, s. 5 (2).

It was proved or admitted that the respondent was the occupier of a field on which were a straw rick and the remnants of a corn rick. The appellant inspected the land on dates in December, 1951, and found severe infestation by rats. He informed the respondent of his duties and liabilities under the Prevention of Damage by Pests Act, 1949, both orally and by letter. In January, 1952, after threshing the corn rick and baling and taking away the straw from the straw rick, the appellant ignited the remains of both ricks, but the fire was put out by the fire brigade before the two ricks were completely destroyed. On Feb. 4 the notice mentioned above was served on the respondent. It expired on Feb. 20, and during the intervening period the respondent did not carry out any poison treatment. On Feb. 20 the appellant visited the land and found evidence of infestation by rats, and there was further evidence of infestation on dates up to Mar. 14.

It was contended on behalf of the appellant that the respondent had failed to take any of the steps required by the notice within the time specified, and, therefore, an offence had been committed. On behalf of the respondent it was contended that it was dangerous to use poison on the land in question; that he had taken other no less effectual steps prior to the service of the notice; that the rat holes were old and disused; and that any rats seen on the land came from adjoining land for which he was not responsible. The justices dismissed the information.

*Widgery* for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of

Buckingham before whom the respondent was summoned for failing to take steps to destroy rats and to keep land free from rats, pursuant to a notice served under the Prevention of Damage by Pests Act, 1949.

The facts show that the local authority were satisfied that for some period these premises had been infested with rats, and I daresay they were right. They served a notice on the respondent requiring him to take certain steps, to which I will refer in a moment. He did not appeal against this notice, and he was subsequently prosecuted because, it was said, he had disregarded the notice that was served on him. Section 5 (2) of the Act provides that, if a person fails to take steps which the local authority can require him to take under s. 4, he shall be

"liable on summary conviction to a fine not exceeding in the case of a first offence £50, and in the case of a second or any subsequent offence £100."

I do not think the actual point which the court has taken in this matter was argued below, but whether it was argued below or not, it is a point that arises on the face of the Case. The justices, having stated the facts proved before them, say:

"We, being of opinion that the prosecution had failed to discharge the onus of proof, dismissed the said information",

and they ask us whether or not they were right in dismissing the information. The point that the court has taken in this matter is this. Section 4 provides:

"(1) If in the case of any land it appears to the local authority, whether in consequence of a notice given in respect of the land under the last foregoing section or otherwise, that steps should be taken for the destruction of rats or mice on the land or otherwise for keeping the land free from rats and mice, they may serve on the owner or occupier of the land a notice requiring him to take, within such reasonable period as may be specified in the notice, such reasonable steps for the purpose aforesaid as may be so specified . . .

(5) Sub-sections (3) to (5) of s. 290 of the Public Health Act, 1936 (which provide for an appeal to a court of summary jurisdiction against certain notices requiring the execution of works under that Act) shall apply to any notice served under this section requiring the carrying out of any structural works as they apply to any such notice as is mentioned in sub-s. (1) of that section . . ."

That only applies to structural works and not to such a notice as this. Therefore, the owner must comply with the notice or else he commits an offence, and he has no means of appealing against the notice. The notice in this case requires the owner to take the following steps (for the destruction of rats on the said land and for keeping the said land free from rats), that is to say,

"poison treatment of infested land, such measures to be carried out to the approval of the local authority, or other work, of a not less effectual character, to be executed for the destruction of the rats."

In the opinion of this court, that is not specifying the steps which are to be taken. It specifies a step which the owner may take and it tells him he may take other steps which they do not specify. The thing required to be done at once becomes unspecified because it says the owner is to do a particular thing or something else and the something else is left completely at large. I do not think, therefore, it can be said that this notice complies with the section. If it had confined itself to poison treatment, it would have complied with the section, but as it does not confine itself to poison treatment, but says that the owner is to



put down poison or do something else which it does not specify, in my opinion, this is not a good notice under the Act. Accordingly, I think the prosecution fails in limine, and the justices were right in not convicting.

**CROOM-JOHNSON, J.:** I agree, for the same reasons.

**PEARSON, J.:** I agree.

*Appeal dismissed.*

Solicitors: *Preston, Lane-Clayton & O'Kelly*, agents for *Reynolds, Parry-Jones & Crawford*, High Wycombe (for the appellant).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 21, 1953

BOWERS AND ANOTHER *v.* SMITH

EVANS AND ANOTHER *v.* SMITH

FLACK AND ANOTHER *v.* SMITH

*Children and Young Persons—Need of care or protection—Probation order—Order to parent to exercise proper care and guardianship—Indecent conduct on football field—No knowledge on part of parents—Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 62 (1) (c), (d).*

Boys under the age of seventeen years on several occasions had sexual intercourse with a girl in a latrine in a football field. Their parents had no knowledge of their conduct.

HELD: that the circumstances did not justify justices in drawing the inference that the parents had failed to give the boys adequate moral instruction so that the boys were in need of care or protection by reason of exposure to moral danger, and that orders under s. 62 (1) (c) of the Children and Young Persons Act, 1933, requiring the parents to enter into recognisances to exercise proper care and guardianship, and under s. 62 (1) (d) placing the boys on probation, must be quashed.

CASES STATED by Gloucestershire justices.

At a court of summary jurisdiction sitting at Cheltenham on July 18, 1952, the respondent, Sidney John Smith, preferred a complaint under the Children and Young Persons Act, 1933, s. 62 (2) against (i) the appellants, Kenneth John Bowers and Thomas Arthur Bowers, (ii) the appellants, Allan Charles Evans and Edwin Henry Price Evans, and (iii) the appellants, Terence John Flack and Edith Gladys Gavin, charging in each case that the first-named appellant, being a young person under the age of seventeen years, was in need of care and protection by reason of exposure to moral danger through his parent, the second-named appellant, not exercising proper care and guardianship.

It was proved or admitted that each first-named appellant, then under the age of seventeen years, committed indecent conduct by having sexual intercourse (in the case of Flack, by endeavouring to have sexual intercourse) with a girl named Jean Smith, then aged seventeen years, two months, in a latrine in a football field adjoining the Beeches Recreation Ground, Cheltenham, on June 11, 1952; that Bowers watched while Flack attempted sexual intercourse and that Flack watched while Bowers had sexual intercourse with the said Jean

Smith; that a boy, Roy Edwards, watched while Evans had sexual intercourse, and that Evans watched while the boy Edwards had sexual intercourse with the said Jean Smith; that there were about thirty boys between the ages of eight and sixteen years in the field at the time and that the latrine was a make-shift corrugated iron structure affording little privacy; that Bowers and Evans had had sexual intercourse with the said Jean Smith on previous occasions in another field; that there was no evidence that any one of the second-named appellants knew of the existence of the said Jean Smith or had been warned in any way of the likelihood of her presence or the presence of any other undesirable female at or in the vicinity of the said football field; that there was no evidence that any second-named appellant was, or should have been, aware that the giving of permission to his or her son, one of the first-named appellants, to play football at the place in question, involved any likelihood that the respective first-named appellant would there come into contact with any undesirable member of the opposite sex; that there was no evidence that any first-named appellant had ever committed or attempted to commit any act of indecency with any female other than the said Jean Smith; that there was no evidence that any second-named appellant had ever attracted the attention of the police by conduct involving a breach of the law or a neglect of the duties of a good citizen; and that there was no evidence that any second-named appellant had or had not given any or adequate sexual instruction to the respective first-named appellant.

It was contended on behalf of the appellants that, as stated in *CLARKE HALL AND MORRISON ON CHILDREN*, 4th ed., p. 3:

" . . . where a juvenile is brought before a juvenile court not charged with an offence, but as in need of care or protection or beyond control, the first business of the court is to try the issue whether or not the case is brought within the terms of the statute, and only if this be proved by proper evidence can the court proceed to decide upon treatment. If the case be not proved, then whatever be the ground upon which the juvenile has been brought before the court he must be released from custody. The liberty of the subject, however small that subject may be, must be safeguarded by the courts, and as the case of *Rex v. Toynbee Hall Juvenile Court JJ. Ex p. Joseph* (1) showed, the High Court will intervene where that liberty has been invaded without proper legal justification ";

that on the occasion in question there was no evidence that any second-named appellant was failing to exercise proper care and guardianship, or, if any first-named appellant was exposed to moral danger (which was denied), that this was through the respective second-named appellant "not exercising proper care and guardianship"; that these words should be construed as having the same meaning as "wilfully neglects" as defined by LORD RUSSELL OF KILL-OWEN, C.J., in *Reg. v. Senior* (2); and that the first-named appellants were not exposed to moral danger within the meaning of s. 61 of the Children and Young Persons Act, 1933, so that any order made under s. 62 would be in excess of the court's jurisdiction.

The justices were of the opinion that the second-named appellants could not have given any or any adequate instruction to the respective first-named appellants in standards of morality and behaviour and matters of sex, and, therefore, they held that the first-named appellants were in need of care and

(1) 103 J.P. 279; [1939] 3 All E.R. 16.

(2) 63 J.P. 8; [1899] 1 Q.B. 283, 291, 292.

protection by reason of exposure to moral danger through the respective second-named appellants not exercising proper care and guardianship, and ordered (i) under s. 62 (1) (d) of the Act, that the first-named appellants be placed under the supervision of a probation officer for two years, and (ii) under s. 62 (1) (c), that the second-named appellants should enter into a recognisance in the sum of £5 to exercise proper care and guardianship. The appellants appealed against the orders.

*S. H. Noakes* for the appellants.

*Smallwood* for the respondent.

**LORD GODDARD, C.J.:** These three Cases are stated by justices for the county of Gloucester sitting at Cheltenham, before whom the appellants, three boys and their parents, were brought under s. 61 and s. 62 of the Children and Young Persons Act, 1933. Section 61 (1) of that Act provides:

"For the purposes of this Act a child or young person in need of care or protection means a person who is—(a) a child or young person who, having no parent or guardian or a parent or guardian unfit to exercise care and guardianship or not exercising proper care and guardianship, is either falling into bad associations, or exposed to moral danger, or beyond control . . ."

If the justices find that, they can, among other things, under s. 62 (1) (d) put the young person under the supervision of a probation officer. With regard to parents it is provided, by s. 62 (1):

"If a juvenile court is satisfied that any person brought before the court under this section by a local authority, constable, or authorised person, is a child or young person in need of care or protection, the court may . . . (c) order his parent or guardian to enter into a recognisance to exercise proper care and guardianship . . ."

In this case, not only was an order under s. 62 (1) (d) made in the case of each boy, but also each parent was ordered, under s. 62 (1) (c), to enter into a recognisance in the sum of £5 to exercise proper care and guardianship.

The case raises the question whether in the circumstances the justices had any power to make such an order. The boys were brought before the court because a very disgusting state of affairs had been brought to the attention of the police. The boys were allowed to go to a football field by their parents—in fact I have no doubt they were sent there by their parents—to play games, and there they were guilty of conduct of a most reprehensible character which was deserving of some condign punishment. But it is quite another thing to say that, because these boys committed a grossly dirty act of this sort, they did it because their parents had not exercised proper care and control over them. All that the parents had done in this case was to send the boys to play football. The justices tell us in each Case:

"That there was no evidence that the parent knew of the existence of [the girl], or had been warned in any way of the likelihood of her presence or the presence of any other undesirable female at or in the vicinity of the said football field. That there was no evidence that the parent was or should have been aware that the giving of permission to his son to play football at the place in question, involved any likelihood that their sons would there come into contact with any undesirable member of the opposite sex. That there was no evidence that [the son] has ever committed or attempted to commit any act of indecency with any female other than

[the girl]. That there was no evidence that the parent has ever attracted the attention of the police by conduct involving a breach of the law or a neglect of the duties of a good citizen. That there was no evidence either that the parent had, or that the parent had not, given any or adequate sexual instruction to the boy."

With regard to the last finding, parents are entitled to hold different views on that subject. Some parents hold the view that it is not desirable to give sexual instruction to boys at this age. Certainly, the appellant, Edith Gladys Gavin, might not care to give it herself, the boy not having a father, but, can it be said that there was any evidence before the court that the parents had not exercised proper care and guardianship? Of course, if boys are found repeatedly committing criminal or disgraceful acts, the court may be justified in drawing the inference that parental discipline is wanting. In such cases it ought not to be difficult to give some evidence from which the court can infer the existence of such a state of things, but to say that, because three young adolescents who have just come to puberty have had intercourse with a disreputable girl when they were sexually excited and, perhaps, tempted by the girl, their parents have been guilty of not exercising proper care and attention seems to me to be going a great deal too far. The conclusion of the justices was:

" . . . that the parent of the son could not have given any or adequate instruction to the latter in standards of morality and behaviour and matters of sex as shown by his conduct",

and then they set out the acts in which these boys had indulged. It is a very serious thing to say, even if it happens on two or three occasions with the same girl, the parents knowing nothing about it, that because young adolescents commit some sexual misbehaviour—whether it amounts to a crime or not is for this purpose immaterial—it is due to neglect on the part of the parents. I do not think that the statute was ever meant to deal with a case like this. If a girl or a boy is found being kept in a house where the mother is permitting prostitutes to assemble or to be housed, or if the mother herself is a prostitute or is carrying on a loose life, it is very proper that the children should be removed, but I fail to see that there is anything here which justified the justices in coming to their conclusion that, because these boys have been guilty of the conduct which has been described—which has been brought to the attention of the parents for the first time—the parents are to be held to blame for not having exercised proper care or guardianship because the justices think they cannot have given the boys sexual instruction. One knows that young adolescents commit indecent acts, and, no doubt, lewd conversation takes place which parents correct if they know of it, but those things, as a rule, are done in secrecy. Although the acts against the girl in the present case were done in the presence of other boys on a football field, which makes the boys' behaviour all the more reprehensible, there is not the least suggestion that the parents had any idea of what was going on. No one would say that it was in the least wrong to let the boys go to the field to play football. I cannot agree that, merely because it is found that sexual intercourse has taken place with one girl, that justifies the justices in coming to the conclusion that the parents have not exercised proper care and attention. Accordingly, these three appeals must be allowed and the orders set aside.

**CROOM-JOHNSON, J.:** Sections 61 and 62 of the Children and Young Persons Act, 1933, contain most valuable provisions for the protection of young people and for bringing them up in the right way. It is because of that that



I have approached this case with a good deal of anxiety, looking to see whether the express provisions of beneficent sections are likely to be spoiled by any observations I may make. It must be remembered that, while these sections do not deal with a criminal offence, the fact that an order has been made with regard to the children of apparently quite respectable citizens makes it incumbent on the tribunal which has to deal with the matter to proceed with a high degree of caution. No one seems to have thought of the possibility in this case that adequate instruction may have been given by the parents, and, as not infrequently happens with regard to parental advice, the young people in question did not choose to take advantage of it. No doubt, there are cases in which justices who have to deal with such matters may, from a persistent course of conduct by a young person, properly come to the conclusion that there must have been something lacking in the state of affairs at home and in the discharge of their duties by the parents. That is something with which justices will deal most carefully, with due regard to the express provisions of the statute. It seems to me that there is no material here on which the justices were entitled to draw that inference, if (though I am not sure) they did so. When one is being invited to draw an inference against a person because of something his child has done which is not to be commended, I venture to suggest that the justices should proceed with very considerable caution. I agree with what my Lord has said, and I think that in the present case the justices have erred. I agree that these appeals should be allowed and the orders set aside.

PEARSON, J.: I agree.

*Appeal allowed.*

Solicitors: *Gibson & Weldon*, agents for *A. Mason Amery & Co.*, Cheltenham (for the appellants); *Field, Roscoe & Co.*, agents for *Guy H. Davis*, clerk of the county council, Gloucester (for the respondent).

T.R.F.B.

#### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 21, 1953

CARD *v.* SALMON

*Examining Justices—No power to state Case—Indictable Offences Act, 1848 (11 & 12 Vict., c. 42), s. 17—Summary Jurisdiction Act, 1879 (42 & 43 Vict., c. 49), s. 17 (1), s. 33 (1).*

Once a defendant elects to be tried by a jury, justices are required by s. 17 (1) of the Summary Jurisdiction Act, 1879, to deal with the case in all respects as if it were an indictable offence; and as thereafter they are sitting, not as a court of summary jurisdiction, but as examining justices under the Indictable Offences Act, 1848, s. 17, they have no power to state a Case for the opinion of the High Court.

CASE STATED by Devizes justices.

On Aug. 12, 1952, at a court of summary jurisdiction at Devizes an information was preferred by the respondent, a police officer, charging the appellant with an offence against the Road Traffic Act, 1930, s. 11 (1), in that, on May 22, 1952, he drove a motor vehicle in Devizes in a manner dangerous

to the public. Before the charge was entered on, the justices granted an application by the prosecution, under the Criminal Justice Act, 1948, s. 28 (1), for the case to be tried summarily. The appellant, when invited to say whether he wished the charge to be dealt with summarily or by a jury, elected to be tried by a jury if a case should be made out. Before any evidence was heard, it was contended on behalf of the appellant that the requirement of the Road Traffic Act, 1930, s. 21, in regard to notice of intended prosecution, had not been complied with. The justices, acting as a court of summary jurisdiction, determined that the requirement of s. 21 had been sufficiently complied with, and, on an application by the appellant, they purported to state a Case in regard to their determination on the point.

*Skelhorn* for the appellant.

*Brodrick* for the respondent.

**LORD GODDARD, C.J.:** This purports to be a Case stated by justices for the borough of Devizes, before whom the appellant was summoned under the Road Traffic Act, 1930, s. 11 (1), for driving a motor vehicle in a manner dangerous to the public. Before the case was gone into, he was asked whether he wished to be tried summarily or by a jury, and he claimed his right to go before a jury. Thereupon, the clear duty of the justices, under s. 17 (1) of the Summary Jurisdiction Act, 1879, was to sit as examining justices, and take the depositions.

Section 17 (1) of the Act of 1879, as amended by the Criminal Justice Act, 1948, s. 79 and sched. IX, provides:

"A person when charged before a court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, if he appears in person to answer the charge and before he pleads to the charge, but not afterwards, claim to be tried by a jury, and thereupon the court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction, and the offence (if not indictable otherwise than by virtue of this section) shall as respects the person so charged be deemed to be an indictable offence, and if the person so charged is committed for trial, or bailed to appear for trial, shall be prosecuted accordingly . . ."

Under the Road Traffic Act, 1930, s. 11 (1), the offence of dangerous driving may be prosecuted summarily or on indictment, but, as, under s. 11 (1) (a), the defendant is liable on summary conviction to be sent to prison for four months, he can claim his right to be tried by a jury, as the appellant did in this case, and thereupon the jurisdiction of the justices to hear and determine the case ceases. They then have to act as examining justices under the Indictable Offences Act, 1848, and take depositions under s. 17 of that Act.

In the present case, after the appellant had elected to be tried by a jury and before any evidence had been given, his solicitor asked the justices to give a decision on a question relating to the validity of the notice of intended prosecution which had been served on the appellant under s. 21 of the Act of 1930. By proviso (ii) to s. 21, the requirement of the section

"shall . . . be deemed to have been complied with unless and until the contrary is proved",

and, therefore, the onus would be on the appellant to prove that it was not

complied with. The point should not have been taken before the justices, as it is a point of defence which would have been open to the appellant at the trial for which he had elected. If, after hearing the evidence, the justices had come to the conclusion that, on the facts, no jury would convict the appellant of an offence against s. 11 (1) of the Road Traffic Act, 1930, they could have ordered him to be discharged, under s. 25 of the Act of 1848, on the ground that a *prima facie* case had not been made out against him, but the question whether s. 21 of the Act of 1930 had been complied with was one partly of law and partly of fact which had to be decided by the court of trial.

The difficulty which confronts counsel for the appellant is that examining justices have no power to state a Case. A Case can be stated only by justices who are empowered to try a cause, i.e., by justices sitting as a court of summary jurisdiction, or by quarter sessions when sitting as a court of appeal from an order of justices. Justices have power to state a Case when they are sitting as a court of summary jurisdiction because, subject to appeal, their decision is conclusive, and they are entitled to ask this court whether or not it is in accordance with law. On the other hand, when they are sitting as examining justices, they have only to determine, under s. 25 of the Act of 1848, whether or not there is a *prima facie* case against the defendant so that he shall be committed for trial. The stating of a Case, like any other form of appeal, is a matter arising entirely from statute. After a defendant has claimed to be tried by a jury, the justices must deal with the case as if he were charged with an indictable offence, and they are then sitting under the Indictable Offences Act, 1848, and not under the Summary Jurisdiction Acts.

I have had some difficulty in following the argument of counsel for the appellant which was based on s. 13 (11) of the Interpretation Act, 1889. That subsection does not turn a court of examining justices into a court of summary jurisdiction. In this case the justices were empowered to hear the case, not by the Summary Jurisdiction Acts, but by the Road Traffic Act, 1930, s. 11 (1), which provides that the offence of dangerous driving can be dealt with as an indictable offence or as an offence which can be tried summarily. The person charged being liable on summary conviction to imprisonment for a term exceeding three months, the Summary Jurisdiction Act, 1879, s. 17 (1), applies, and, if the person charged elects to be tried by a jury, the case becomes for all purposes an indictable offence, and the Indictable Offences Act, 1848, then applies, and not the Summary Jurisdiction Acts. Accordingly, there was no power to state the Case, and we dismiss the appeal.

CROOM-JOHNSON, J.: I agree.

PEARSON, J.: I also agree.

*Appeal dismissed.*

Solicitors: *Darley, Cumberland & Co.*, agents for *Wansbroughs, Robinson, Tayler & Taylor*, Devizes (for the appellant); *Taylor, Jelf & Co.*, agents for *Wilson & Sons*, Salisbury (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 23, 1953

REG. v. WIMBLEDON JUSTICES. *Ex parte* DERWENT

*Housing—House constructed under licence from local authority—Condition limiting rent—Letting at excess rent—Time limit on prosecution—Building Materials and Housing Act, 1945 (9 & 10 Geo. 6, c. 20), s. 7 (1)—Summary Jurisdiction Act, 1848 (11 & 12 Vict., c. 43), s. 11.*

The offence of letting a house constructed under a building licence granted by a local authority at a rent in excess of the maximum permitted under the terms of the licence, contrary to s. 7 (1) of the Building Materials and Housing Act, 1945, is not a continuing offence, and, therefore, by reason of s. 11 of the Summary Jurisdiction Act, 1848, a prosecution for that offence must be brought within six months of the date of the letting.

*Magistrates—Excess of jurisdiction—Prohibition.*

A writ of prohibition to prohibit justices from acting in excess of jurisdiction may issue although the matter of jurisdiction is one on which the justices can be required to state a Case for the opinion of the High Court.

APPLICATION for writ of prohibition.

On June 12, 1952, seven informations were laid against the applicant, Sidney Derwent, by the Wimbledon Corporation under the Building Materials and Housing Act, 1945, s. 7 (1), charging that he had let seven sets of premises, in respect of which building licences had been issued, at rents in excess of the maximum rents permitted by the building licences and subject to which they were issued. The building licences were issued to the applicant by the borough council on dates between Nov. 2, 1948, and Mar. 7, 1950, subject to the provision that the premises were not to be let at rents in excess of certain figures varying between £125 and £208 per annum according to the size and nature of the premises. On dates between Nov. 1, 1949, and Aug. 12, 1951, the applicant had let the seven sets of premises in question at rents which exceeded the permitted rents by £23 to £25.

On the hearing of the first information, the preliminary objection was taken on behalf of the applicant that the justices had no jurisdiction to hear the charge, since the information was not laid within six calendar months from the time when the matter of the information arose, as required by s. 11 of the Summary Jurisdiction Act, 1848, no time being specially limited for the bringing of the information in question under the Act of 1945. The prosecution applied for the amendment of the summons by the addition of the words: "and that the said house continued to be and is still let at the said rent which is in excess of the rent so limited". The justices ordered the amendment to be made and decided that they had jurisdiction to hear the information as amended. The hearing was adjourned, and the Divisional Court granted the applicant leave to apply for an order of prohibition addressed to the justices prohibiting them from hearing this and the other six informations preferred against him by the corporation, on the ground that the offence created by s. 7 (1) of the Building Materials and Housing Act, 1945, was complete at the date of the letting complained of, and that, in consequence, the summonses, not having been issued within six months of that date, were out of time.

M. R. Nicholas for the applicant.

Sachs, Q.C., and Elson Rees for the justices.

LORD GODDARD, C.J.: Counsel for the applicant in these cases moves for orders of prohibition to justices for the county of Surrey sitting at Wimbledon,



prohibiting them from continuing to hear seven summonses alleging offences by him against the Building Materials and Housing Act, 1945, s. 7 (1).

Despite a very strenuous and clear argument by counsel for the justices I am of opinion that this case seems to me to involve a simple question of construction. Under the Building Materials and Housing Act, 1945, s. 7 (1), it is provided that where a person obtains a licence from a local authority enabling him to build a house the authority can impose a condition limiting the price at which the house may be sold or the rent at which it may be let. We have not gone into the merits of these cases, and we decide them on the ground of jurisdiction. The offence of selling or letting a house above the figure limited in the licence is made a summary offence by the sub-section. It is elementary that summary jurisdiction is entirely a creation of statute, and the proceedings of justices are governed by the Summary Jurisdiction Acts. Section 11 of the Summary Jurisdiction Act, 1848, provides:

" . . . In all cases where no time is already or shall hereafter be specially limited for making any such complaint or laying any such information in the Act or Acts of Parliament relating to each particular case, such complaint shall be made and such information shall be laid within six calendar months from the time when the matter of such complaint or information respectively arose."

It would seem to be clear from that section that, if a case is brought before justices and on the face of the proceedings it can be seen that the offence alleged to have been committed took place more than six months before the information was laid, justices have no power to enter on the matter at all, because they have no jurisdiction to sit as a court of summary jurisdiction in the case of an offence alleged to have been committed more than six months before.

Therefore, what we have to consider is whether or not the offence which is laid here took place more than six months before the information was laid. On the information that was laid in the first case it was said that on Apr. 27, 1950, the defendant did unlawfully let a house known as 5, Church Hill, Wimbledon, for a term of seven years from Mar. 25, 1950, at a rent of £245 per annum exclusive of rates notwithstanding that it was a condition of the granting of the building licence dated June 30, 1949, under which the said house was erected, that the said house should not be let at a rental in excess of £220 per annum exclusive of rates, contrary to s. 7 (1) of the Building Materials and Housing Act, 1945. The point was taken before the justices that they could not enter on the hearing of the case because on the face of the information the offence had been committed more than six months previously. Thereupon it occurred to the prosecution, in order to enable jurisdiction to be given to the justices, as they thought, to ask the justices to amend the information by inserting, immediately after the words "at a rental in excess of £220 per annum exclusive of rates", these words: "and that the said house continued to be and is still let at the said rent which is in excess of the rent so limited."

The question we have to decide is whether that discloses any offence under the Act. I need hardly say that there are many Acts of Parliament with which this court is very familiar in which a certain act is constituted an offence, and it is provided that for every day that act continues or remains unabated there shall be a continuing offence, and a penalty is fixed for every day, or week, or month, that the state of affairs exists. There are no such words as that, and it is not contended that there are, in this statute. The Building Materials and Housing Act, 1945, s. 7 (1) is in these words:

"Where a house has been constructed under the authority of a licence

granted for the purposes of a defence regulation (hereinafter referred to as 'a building licence') and the licence, whether granted before or after the passing of this Act, has been granted subject to any condition limiting the price for which the house may be sold or the rent at which it may be let, any person who, during the period of four years [which has now been extended to eight years by the Housing Act, 1949, s. 43 (1)] beginning with the passing of this Act, sells or offers to sell the house for a greater price than the price so limited (hereinafter referred to as 'the permitted price'), or, as the case may be, lets or offers to let the house at a rent in excess of the rent so limited (hereinafter referred to as 'the permitted rent'), shall be liable on summary conviction to a fine not exceeding the aggregate of—(a) such amount as will in the opinion of the court secure that he derives no benefit from the offence; and (b) the further amount of £100; or to imprisonment for a term not exceeding three months, or to both such fine and such imprisonment",

so it is a serious offence.

We are asked to say that the words "lets or offers to let" are to be construed as meaning that an offence is committed during the whole time of the lease. In my opinion, such a construction is impossible. A person lets a house once and for all when he demises the house by means of the lease, and it is conceded in this case—because counsel for the respondents could not argue otherwise—that in a case of sale the offence takes place once and for all when the house is sold, i.e., when the conveyance is executed, or even when the house is offered for sale. How can we possibly give a different construction to the words "sells or offers to sell" from the words "lets or offers to let"? It would be impossible. The words appear in the same section, and, if we gave a construction such as we are asked to give here in the case of "let or lets", we should have to give the same construction to the word "sell". Therefore, if a man sold a house in contravention of the section, years afterwards he might be prosecuted. We are asked to say that Parliament must have assumed that a local authority might not be able to find out that an offence had been committed at once, and, therefore, we ought to give some benevolent construction to the section and convert into an offence that which the statute does not say is an offence. I think it is much more probable, as these rents and prices have to be registered and are to be regarded as land charges and open for inspection (see s. 8 (1)), that Parliament assumed that intending lessees and intending purchasers would search the register of charges and find out if they were being overcharged. Then, if they were being overcharged, they would take proceedings to protect themselves. It seems to me that it would have been possible, though it would be putting a burden on local authorities, to have made it a condition of giving a licence that the local authority should have stipulated that before a house was let or a sale completed, the lessor or vendor should send them the documents so that they could see that the terms of the licence were being fulfilled. But, whether or not it is desirable that the law should be amended is not for this court. We can find nothing in this section which enables us to construe the words "lets or offers to let" as providing for a continuing offence for the purposes of this section, any more than, as is admitted, we can construe "offers to sell" as a continuing offence.

That is the short and conclusive answer to the question of construction which has been raised, and I do not think any of the cases that have been cited give any assistance. *Stray v. Docker* (1) was much relied on by counsel for the respondents,

(1) 108 J.P. 116; [1944] 1 All E.R. 367; [1944] K.B. 351.

but that was a case under a different Act (the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920) and under quite different words. It was pointed out in the course of the argument that it would appear that ASQUITH, J., would have accepted the particular words as one finds them there and have decided the case differently from what he did.

Therefore, the court has no doubt on the true construction of this sub-section that the offence was committed once and for all when the house was demised, that is to say, when the lease was executed, which was on Apr. 27, 1950. But counsel for the respondents argues that we ought not to deal with these cases by way of prohibition. Earlier in my judgment I pointed out that the words of s. 11 of the Summary Jurisdiction Act, 1848, limit the jurisdiction of justices. They take away jurisdiction to deal with any case where the offence has been committed more than six months before the information was laid. If that is so, and justices have no jurisdiction, this court is entitled, and ought, to issue prohibition to prevent them from going on with a case. They most properly adjourned these cases in order that this point might be argued, so that, if prohibition were refused, they could continue the hearing of the cases, but now they will be prohibited from going on. It is certainly the most convenient course to take to prevent a lot of expense being incurred in hearing these seven summonses, and I think the applicant is entitled to this relief of prohibition because, if a court has no jurisdiction, no consent can give it jurisdiction. I do not deny that justices may, if this court is not asked to prohibit them from doing it, proceed to hear a case, and the point can be taken before them: "You have no jurisdiction to convict in this case, and if you do convict, we shall ask for a Special Case." The statutory provisions which provide for the stating of Cases by justices enable Cases to be stated on questions of jurisdiction, but the fact that that can be done is no reason why, if the court is satisfied that there is a lack of jurisdiction in the justices, they should not issue prohibition, which is the very object with which that writ has been framed. It is the direction of a superior court to an inferior court to prevent the inferior court acting without jurisdiction, and it would be acting without jurisdiction if the justices convicted in these cases, where the offences have been committed more than six months before. It is an entirely different case from those which from time to time come before this court, for instance, proceedings of a Rent Control Tribunal who, before they can say whether they have jurisdiction or not, have to inquire into certain facts. The well-known case on the subject entitling the court to say that a court may be entitled to inquire into facts to discover whether they have jurisdiction or not is the judgment of LORD ESHER in *Reg. v. Income Tax Special Purposes Comrs.* (1), where he pointed out that it is legitimate when the jurisdiction of justices or inferior bodies depends on the existence of certain facts for them to inquire into those facts to find out whether they have jurisdiction or not, and the court will then review the finding of fact because, if this court came to the conclusion that the facts were wrongly found, they would say that the justices acted without jurisdiction. But that is not this case because the defect appears on the face of the proceedings. The information clearly shows an offence which was committed once and for all on Apr. 27, 1950. It follows, therefore, that the court has no jurisdiction to inquire into that offence when the information was not laid till June 12, 1952. The result is that the order will go in all these cases.

**CROOM-JOHNSON, J.:** The proceedings in this case started with an information on June 12, 1952, alleging, inter alia, that the applicant had unlawfully let a house, 3, Church Hill, Wimbledon, on June 7, 1951, for a term of

(1) (1888), 53 J.P. 84; 21 Q.B.D. 313.

seven years for a consideration which consisted of a total money rent in excess of that which was provided as being the maximum in a licence under s. 7 (1) of the Building Materials and Housing Act, 1945. On the face of that information it was apparent, therefore, that the proceedings were being taken in respect of a matter which had arisen and an offence which had been committed more than six months before the information. On the point being taken before the justices, they adopted a method of getting rid of this, I should have thought, palpable, objection by amending the information so as to allege that the house continued to be and was still let—that is, at the date of the information—"for the said consideration which is in excess of the rent so limited." The justices decided that that amendment should be made and were, apparently, proceeding on that basis. (Perhaps it is worth just a passing observation that when justices are being invited to make an amendment which affects, or may affect, the liberty of the subject and there are penal consequences of the gravity of those which are indicated in s. 7 (1), they should proceed with very great hesitation and with very great caution). The result was an application to this court by the applicant by which he asked us to interfere by issuing an order of prohibition to prevent the justices going on with the amended information.

It has now been suggested by the respondents through their counsel that the proper construction of s. 7 (1) is that where a house has been let at an excessive rent, at any time when money in respect of that rent is payable an offence is still being committed. That means that a continuation of the original offence of the letting is being committed by the landlord. The answer to that, it seems to me, depends on the proper construction of s. 7 (1), which contains provisions which deal not only with the limitation of the rent of houses constructed under certain building licences, the terms of which are permitted by the statute, but also with sales, and, therefore, with limitations on the purchase prices of houses. With regard to both these subject-matters the legislature has provided that it is an offence either to sell or offer to sell or to let or offer to let at an excessive figure. It is said that when one comes to the words, "lets or offers to let", so long as the term continues, the house is still being let. I should have had great difficulty in appreciating, as a matter of construction, how those words in a penal provision in a statute of this sort could achieve that result, but my difficulties are considerably increased by the admission that, in the case of a sale, no such construction of the words "sell or offers to sell" is possible. I have read and re-read this part of s. 7 (1). I have looked at other sections which deal with other remedies, and I am unable to see, by any canon of construction with which I am acquainted, that it is possible to construe the words "lets or offers to let" as resulting in a continuing offence. As a general rule, the court is not eager to find continuing offences provided by a statute—certainly not without express words which make clear that that was the intention of the legislature when the statute was passed. I cannot see anything here which indicates anything of the sort. It would have been easy to put in some such provision as has been suggested by my Lord, to the effect that, if a contravention of the statute is not put right, there shall be deemed to be a continuing offence, and providing, for example, for a daily, weekly, or monthly penalty. There is nothing of that sort here. Such provisions in statutes are well known, and I think that this courageous effort to support the action of the justices fails. The defect in the informations as they originally were is not cured by the amendments which the justices allowed. In other words, the justices should be prohibited from continuing with the hearing of these matters in the form in which they have permitted them to be amended.



It is said as a sort of *tabula in naufragio* that the remedy of prohibition is not open to this court to impose, but I do not wish to add anything about that. I concur with my Lord's judgment.

**PEARSON, J.:** I agree. I think it is plain, when one considers carefully all the provisions of s. 7 (1) together with the provisions of the interpretation section, s. 9 (3) (b), that a person lets a house if he demises a house or agrees to demise it, and the offence under s. 7 (1) of letting a house at a rent in excess of the permitted rent is completed with the execution of the lease or the conclusion of the agreement to let the house. That appears strongly from the provisions of s. 7 (1), and support for it can be derived from the provisions of s. 7 (2), that in certain circumstances a house shall be deemed to have been let at a rent in excess of the permitted rent, which, of course, implies that it is something which has already taken place at a moment of time. There is similar wording in s. 7 (4), referring to the rent at which the house was let, showing that it is a past event which has occurred, and, again, in s. 7 (5), the wording is:

"In determining for the purposes of this section the consideration for which a house has been sold or let . . ."

There it is contemplated as a past event, already complete. Then there is an interesting instance in s. 7 (7) (b):

"... where any person is convicted of the offence of letting a house at a rent in excess of the permitted rent, the court may, if the interest created by the letting has not expired at the time of the conviction . . ."

I think the language of that paragraph, as well as the language of the Act in general, is carefully chosen and is accurate language. It means that the letting is a demise which creates an interest forthwith. It is the interest which continues and the act of demise has already taken place. I would say, finally, that I think that *Stray v. Docker* (1), operates to confirm the view which this court has taken of the meaning of the Act in this case because both HUMPHREYS, J., and ASQUITH, J., distinguish clearly between the two conditions which, under the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 10, had to be fulfilled before the Act operated. HUMPHREYS, J., said:

"The section prescribes that there must be a letting after a certain date, and it must also be proved that the rent charged, which includes payment in respect of the use of furniture, yields to the landlord a profit which, having regard to all the circumstances of the case, is extortionate."

He went on to say:

"In my view, the real offence created by the section is not the letting of the dwelling-house to which the Act applies, although that must necessarily be an incident in the commission of the offence, but the charging to the tenant of a rent which in all the circumstances yields to the landlord an extortionate profit."

There is similar reasoning in the judgment of ASQUITH, J., in the same case. Having regard to those factors, I think it is clear that there is only one possible answer to the question of construction, and that is the answer which has been given, and so I concur in the order proposed.

*Order of prohibition to issue.*

Solicitors: *Kenneth Brown, Baker, Baker* (for the applicant); *E. M. Neave*, town clerk, Wimbledon (for the justices). T.R.F.B.

(1) 108 J.P. 116; [1944] 1 All E.R. 367; [1944] K.B. 351.

## COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 26, 1953

REG. v. TALBOT

*Criminal Law—Sentence—Corrective training—Consecutive sentence of imprisonment not to be passed—Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), s. 21 (1).*

A court should not pass a sentence of imprisonment to take effect on the conclusion of a sentence of corrective training.

REFERENCE BY SECRETARY OF STATE under s. 19 (a) of the Criminal Appeal Act, 1907.

On Mar. 31, 1952, the appellant was convicted at Burnley Quarter Sessions of shop-breaking and larceny, and was sentenced to three years' corrective training. On Apr. 22, 1952, the appellant was brought before the recorder of Sheffield on two charges under the Road Traffic Act, 1930, one for driving while disqualified, and the other for using a licence (that of his brother) with intent to deceive, and he was sentenced to six months' imprisonment on each charge, to run concurrently but to take effect at the conclusion of the sentence of corrective training. The appellant petitioned the Home Secretary in respect of his sentence, and the matter was referred to the Court of Criminal Appeal.

*R. M. O. Havers* for the appellant.

*Drabble* for the Crown.

**LORD GODDARD, C.J.**, delivered the following judgment of the court. This is a matter referred to this court by the Secretary of State under the Criminal Appeal Act, 1907, s. 19 (a), which provides that the Secretary of State may

" . . . refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted . . . "

The appellant, who has a bad character, was convicted at Burnley Borough Quarter Sessions on Mar. 31, 1952, of shop breaking and larceny, and he received what, in the opinion of the court, was a very proper sentence of three years' corrective training. At that time there were two other charges outstanding against him under the Road Traffic Act, 1930, s. 7 (4) and s. 112 (1) (b) (i), and, on Apr. 22, he was brought before Sheffield Quarter Sessions to answer those two further cases. One was the offence of driving while disqualified for holding a driving licence, and the other was for using a driving licence with intent to deceive (he was using his brother's licence and passed it off as his own). Driving when disqualified is regarded by the legislature as so serious an offence that a person convicted of it can be sent to prison for a term not exceeding six months unless the court can find some special reason for thinking that a fine will meet the case. The offence of using a driving licence with intent to deceive, which is almost equivalent to forgery, is punishable by a maximum sentence of two years. The recorder, hearing that the appellant was already serving a sentence of three years' corrective training, passed concurrent sentences for those two offences of six months to take effect at the conclusion of the period of corrective training.

By s. 21 (1) of the Criminal Justice Act, 1948, a sentence of corrective training can only be passed where a person

"who is not less than twenty-one years of age—(a) is convicted on indictment of an offence punishable with imprisonment for a term of two years or more; and (b) has been convicted on at least two previous occasions since he attained the age of seventeen of offences punishable on indictment with such a sentence . . ."

It follows that a person cannot be sentenced to corrective training for driving when disqualified because that is not a sentence punishable on indictment with imprisonment for two years, but he can be sentenced to corrective training for using a driving licence with intent to deceive. But he can only be sentenced to corrective training for that offence if the appropriate notices have been served under s. 23 (1) and it is shown that he is a person with the necessary previous convictions.

The recorder had to pass a sentence of imprisonment for driving when disqualified, and he thought, quite rightly, that the offence of using the driving licence with intent to deceive also deserved a sentence, but, as the notices under s. 23 (1) had not been served, he could not sentence the prisoner to corrective training. The court feels that the only course they can take is to say that the sentences passed by the learned recorder must be concurrent with the sentence of corrective training, and that, in the result, the whole sentence must be served in corrective training, that is to say, the concurrent sentences of imprisonment really have no effect. The appellant will continue to serve the sentence of corrective training. It is very unfortunate, but that seems to be the only result to which we can come on the wording of this Act. As under s. 19 (a) of the Criminal Appeal Act, 1907, we must treat this case as one in which the prisoner has appealed against the sentence—he has, in fact, petitioned the Home Secretary who has referred it to us—we will impose a disqualification for holding a licence to drive a motor vehicle, and we want to see that it takes effect when the prisoner comes out. We have to pass a sentence to take effect from the date of conviction (April, 1952). He has been in prison since March, 1952, so if he earns his remission he will come out of prison in March, 1954, and we think he ought to be debarred from holding a licence for five years from that period. Therefore, the sentence of disqualification will be a disqualification for seven years from Apr. 22, 1952.

*Order accordingly.*

Solicitors: *Registrar of Court of Criminal Appeal* (for the appellant); *John Heys*, town clerk, Sheffield (for the Crown).

T.R.F.B.

## COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 14, 26, 1953

REG. v. DAVIES

*Criminal Law—Evidence—Receiving stolen goods—Previous conviction proved—Count for another offence included in indictment—Conviction quashed—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 43 (1).*

If the prosecution include in an indictment for receiving stolen goods a count for some other offence, e.g., larceny or being accessory after the fact to larceny, they must refrain from giving evidence of a previous conviction of an offence involving fraud or dishonesty under s. 43 (1) of the Larceny Act, 1916, for such evidence is admissible only where the charge is one of receiving alone.

**APPEAL against conviction and sentence.**

The appellant was convicted at Bedfordshire Quarter Sessions of being an accessory after the fact to larceny and was sentenced by the deputy-chairman to eight years' preventive detention. The appellant had been committed for trial on a charge of receiving stolen goods, and before the examining justices the prosecution proved a previous conviction of receiving under s. 43 (1) of the Larceny Act, 1916, the appropriate notice having been given. At quarter sessions the indictment was for receiving only, but counsel for the prosecution obtained the leave of the court to add a count for being accessory after the fact to larceny. The previous conviction was given in evidence, but the count for receiving was subsequently abandoned by the prosecution. The deputy-chairman gave the jury a strong warning to disregard the previous conviction when considering the count for being accessory after the fact to larceny.

*J. C. G. Burge* for the appellant.

*N. MacDermot* for the Crown.

*Cur. adv. vult.*

Jan. 26. **LORD GODDARD, C.J.**, read the following judgment of the court. The appellant was convicted at Bedfordshire Quarter Sessions of being an accessory after the fact to larceny.

In view of the course which the appeal took it is only necessary to state the facts very shortly. A man named Cobb stole a headlamp and a six-volt battery and took them to a café of which the appellant was the manager. Subsequently, the appellant was found in possession of the goods and endeavouring to sell them. He was charged with receiving them knowing them to have been stolen. On that charge he was brought before examining magistrates and the prosecution tendered evidence under the Larceny Act, 1916, s. 43 (1) (b), of a previous conviction of an offence involving dishonesty. This was proved by a police officer and was included in the depositions. The appellant was committed for trial only on a charge of receiving and the indictment contained only a count for that offence. Before the arraignment, however, counsel for the prosecution applied for leave to amend the indictment by including a count charging the appellant with being an accessory after the fact to larceny. His object in so doing was because he felt that there might be a difficulty in proving that at the time the appellant received the goods he knew they were stolen, and, as it turned out, his doubt was well founded, for the evidence showed that the appellant was not at the café when the goods were left there and there was nothing to show that he knew that they were stolen when he first took possession of them. He did not become aware that they had been stolen until a later date. Eventually, the count for receiving was



abandoned by the prosecution, and on it a verdict of Not Guilty was returned. Before the court gave leave to amend, the learned deputy chairman asked the defending counsel if he had any objection to the amendment, and he said that he had not, although in our opinion, leave, if given at all, ought to have been given only on condition that evidence of the previous conviction was not given.

The attention of the deputy chairman was called to *Rex v. Jones* (1) where the appellant was charged both with receiving and with being an accessory after the fact to larceny, and a previous conviction against him of factory breaking with intent was given. The jury acquitted on the charge of receiving and convicted on the accessory counts. This court quashed the conviction, but not on the ground of the reception of that evidence. In giving judgment HUMPHREYS, J., pointed out that advantage had been taken by the prosecution of s. 43 and had proved the previous conviction, and he said:

"This evidence was receivable for the purpose of proving guilty knowledge on the charges of receiving. There was no specific direction to the jury that they must disregard it when considering the charge of being an accessory. It would certainly have been better that the jury should be so directed, but as they acquitted the appellant on the receiving counts to which it specifically related, we think it unlikely that it affected their minds on the other counts."

It was contended that this authority showed that where there was a charge of receiving and also a charge of being an accessory after the fact evidence of a previous conviction could be admitted, provided a warning was given to the jury that, when considering the accessory counts, they must disregard the evidence of previous conviction, and it is only right to say that in his summing-up the learned deputy chairman did give a strong direction to the jury to this effect. At the same time, the passage that I have quoted in the judgment was obiter and we may say, without any disrespect, that the court was not directly considering the admissibility of the evidence where there was a charge of being an accessory after the fact, because they quashed the conviction on quite different grounds. It is, perhaps, curious that there is not more authority on this point, and, indeed, the only other case which affords any assistance is *Rex v. Ballard* (2). In that case there were counts for stealing and receiving, and objection was taken to evidence of a previous conviction on the ground that, though there was evidence on the stealing count, there was none on the receiving count, and, therefore, the evidence could not be admitted. In giving judgment LORD READING, C.J., said:

"The section has to be carefully administered, no doubt, and ought not to be used where there are counts for both stealing and receiving for the purpose of getting a verdict on the count for stealing, where the court cannot exclude the evidence as there is a count for receiving; it might induce the jury to convict of stealing on very slight evidence. So if the charge is substantially one of stealing, and not receiving, the evidence ought not to be given."

He goes on to say

"... but the chairman held that he could not say that the substantial charge was one of stealing, so he felt bound in law to admit the evidence. The court thinks that he was right in that view. They jury found the prisoner guilty of receiving only."

In our opinion, that case shows the true rule. If the case is substantially one

(1) 113 J.P. 18, 20; [1948] 2 All E.R. 964, 967; [1949] 1 K.B. 194, 197.

(2) (1916), 12 Cr. App. R. 1, 4.

of receiving and is presented to the jury on that footing, so that they are not being asked to find a verdict on some other count, evidence of a previous conviction may be admitted, but it cannot be admitted where there is another charge on which a verdict is sought, and we think that the only right rule to lay down is that, if the prosecution feel that they cannot confine their case to one of receiving, but must also rely on some other count, be it of stealing or of being an accessory after the fact to stealing, then, if they include in the indictment a count for either of those offences they must refrain from giving evidence of any previous conviction. Evidence of bad character or of previous convictions is evidence of a most prejudicial kind and is only allowed in receiving cases because the legislature, no doubt, recognised the difficulty which often arises of proving guilty knowledge in such cases. It must be restricted to those cases. One often has to tell a jury to disregard such matters as the statement which one prisoner makes involving another, but there a jury can often see a very good reason for one prisoner trying to throw the blame on another or to see the other does not escape if he himself is being convicted. Here, it is not a mere casual or accidental piece of evidence bearing unfavourably on the appellant's character. It is a case in which a witness was called to prove, and did prove, a specific conviction. No warning could possibly remove that evidence from the minds of the jury, and, accordingly, the court feel they have no option but to allow the appeal and quash the conviction.

*Appeal allowed.*

Solicitors: *Canter, Hellyar & Co.* (for the appellant); *Burgess & Chesher*, Bedford (for the Crown).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 26, 1953

HAINES *v.* ROBERTS

*Road Traffic—Being in charge of motor vehicle when under influence of drink—Vehicle left by owner in public yard—No other person put in charge—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 15 (1).*

A person who leaves a motor vehicle in a road or other public place when away from home remains in charge of it until he puts it into the charge of some other person.

*Quaere:* whether such a person continues to be in charge if he has left the vehicle in a car park where there is an attendant.

CASE STATED by Monmouthshire justices.

At a court of summary jurisdiction sitting at Abergavenny on Sept. 10, 1952, the appellant, John Haines, a police superintendent, preferred an information against the respondent, Haydn George Roberts, charging that he, on July 18, 1952, at Abergavenny, was under the influence of drink to such an extent as to be incapable of having proper control of a motor cycle of which he was in charge, contrary to the Road Traffic Act, 1930, s. 15.

It was proved or admitted that on July 18, 1952, the respondent, who was aged seventeen years and eight months and was employed as an engine fireman, went on his motor cycle to Abergavenny where he left it in the yard at the rear

of a motor garage. During the evening the respondent, who was with a friend, F., became drunk, and shortly after 10 p.m. he was seen leaning on a wall of an omnibus station opposite the said garage by two other friends, S. and H., who had themselves spent the evening in a local cinema, were sober, and had not been drinking with the respondent. S. and H. saw that the respondent was drunk. They took him to the back of the omnibus station and asked him how he was going to get home. He told them that he was waiting for some friends and that he wanted a drink. Knowing that there was a water tap in the rear yard of the garage, S. and H. took the respondent to this yard, and, after he had taken a drink of water, they doused his head under the tap, and the respondent went to sleep and did not wake up till about 11.30 p.m. While the respondent was sleeping, F. arrived on the scene and after discussion it was arranged that F. should go and find a fourth friend who was to ride the respondent's motor cycle back to the respondent's home at Llanellen, some four miles away, and get the respondent's father to fetch the respondent. The respondent took no part in, and was not aware of, these arrangements made by his friends. At about 11.55 p.m., before the arrangements were completed, two police constables found the respondent clinging to an upright steel standard in the rear yard of the garage. He was swaying backwards and forwards, his breath smelled strongly of alcohol, and the constables formed the opinion that he was drunk. They shone a torch and saw a pair of gauntlet gloves and goggles hanging out of the respondent's pocket, and within about five feet of the respondent was his motor cycle. The respondent was asked if it was his motor cycle and he replied: "That is my bike, and you leave it alone." The constables tried to find out who the respondent was and where he lived, but he refused to give any information and was truculent and aggressive. When asked if he intended to ride his motor cycle in his condition, the respondent replied: "If I want to ride that bike, I will ride it, and no one in town will stop me." The respondent was taken to the police station and examined by the police surgeon who found he was under the influence of drink to such an extent as to be incapable of having control of a motor vehicle. The rear yard of the garage was a public place. From the time when S. and H. first saw the respondent they intended to look after him and to prevent him from riding his motor cycle home.

It was contended on behalf of the appellant (i) that the respondent was in charge of the vehicle when interviewed by the police officers in that he had retained the element of control over the said motor cycle, (ii) that he was not insensible and had in no way authorised or acquiesced in the arrangements which his friends were alleged to have set out to make, (iii) that *Crichton v. Burrell* (1), *Dean v. Wishart* (2) and *Adair v. McKenna* (3) were distinguishable from the present case, and that *Leach v. Evans* (4) and *Rez v. Wallhouse* (5) applied. It was contended on behalf of the respondent that, although he was admittedly under the influence of drink to such an extent as not to have proper control of a motor vehicle, he was not "in charge" of his motor cycle at the time in question, that he had been brought by his friends near to his vehicle at the rear yard of the garage from a place further away, that he had neither the intention nor the ability to ride the motor cycle, that he could not be said to be "in charge" of it merely because

(1) [1951] Sc. L.T. 365.

(2) [1952] Sc. L.T. 86.

(3) [1951] Sc. L.T. 40.

(4) 116 J.P. 410; [1952] 2 All E.R. 264.

(5) (1933), 97 J.P. Jo. 699.

he was the owner, and that his friends would have prevented him from riding the motor cycle.

The justices were of the opinion that there had been no movement or possibility of movement, nor was the respondent a free agent, because his presence near his motor cycle was involuntary in the sense that he had been brought to the rear yard of the garage by his friends, that they were looking after him, that they would have been able to prevent him from riding or attempting to ride his motor cycle, and that he did not intend to ride his motor cycle. They, accordingly, dismissed the information and the appellant now appealed.

*Arthur G. Davies* for the appellant.

*James Campbell* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Monmouth before whom the respondent was charged with the offence of being under the influence of drink to such an extent as to be incapable of having proper control of a motor cycle of which he was in charge. [His LORDSHIP stated the facts and continued:] How can it be said that in those circumstances the respondent was not in charge of the motor cycle? He had not put it into anybody else's charge. It may be that, if a man goes to a public house and leaves his car outside or in the car park and, getting drunk, asks a friend to go and look after the car for him or take the car home, he has put it in charge of somebody else, but if he has not put the vehicle in charge of somebody else he is in charge of it until he does so. His car is away from home, on the road or in the car park—it matters not which—and he is in charge. Some day, I daresay, we shall have to decide the question whether, if the car is in a car park and there is an attendant at the car park, the attendant is in charge. That, no doubt, will be a question of fact.

The justices gave a great deal of attention to this case and had three Scottish decisions cited to them. Those cases have also been cited to us, but they are not binding on us and, I think, they are clearly distinguishable. Here it is clear that the respondent was in charge of the motor cycle until he had given it into somebody else's charge. He was not charged with driving while under the influence of drink. In these circumstances the Case must go back to the justices with an intimation that the offence was proved, and with directions to them to convict and to disqualify.

**CROOM-JOHNSON, J.:** I am of the same opinion and for the same reasons.

**PEARSON, J.:** I agree.

*Case remitted.*

Solicitors: *Torr & Co.*, agents for *H. J. P. Candler*, Abergavenny (for the appellant); *Gibson & Weldon*, agents for *Everett & Tomlin*, Pontypool (for the respondent).

T.R.F.B.



COURT OF APPEAL

(SOMERVELL, BIRKETT AND ROMER, L.JJ.)

Jan. 27, 28, 1953

MUIR v. JAMES

*Building Control—Licence for specified work—Authorised expenditure exceeded—Work ordered and executed separately—Execution at same time as licensed work—Defence (General) Regulations, 1939 (S.R. & O., 1939, No. 927), reg. 56A (as amended); sched. VI, Part II.*

APPEAL by the defendant from an order of His Honour JUDGE SIR GERALD HURST, Q.C., made at Lambeth County Court, dated Dec. 9, 1952, on a claim for work and labour.

The plaintiff was a builder. The defendant was the father of the owner of premises known as 18 Lawrie Park Garden, Sydenham, and he intended to occupy a flat on the premises. A building company for whom the plaintiff worked, undertook the work of converting the premises into flats and building a garage, and for this work licences were required and obtained. The plaintiff's claim was in respect of

“ . . . work in connection with cutting back garden beds and excavating over site to form roadway to garage, taking down and re-building part of dwarf burr wall, spreading, levelling and ramming hardcore to roadway, and clearing surplus excavated material, taking out obsolete water main, and repairing leaks in main service pipe.”

No licence was issued for this work, to do which the plaintiff alleged he was employed personally.

The defendant contended, inter alia, that the work in respect of which the plaintiff claimed was within the provisions of the Defence (General) Regulations, 1939, reg. 56A, and that, since it was not licensed, the plaintiff could not recover in respect of it. He further contended that the work should be regarded as a part of or so closely connected with the building of the garage as not to be properly treated as covered by the provision as to the value of work that could be done without a licence: see the principle laid down in *Dennis & Co., Ltd. v. Munn* (1).

*Syrett* for the defendant.

*D. G. Wright* for the plaintiff.

SOMERVELL, L.J., said that in *Dennis & Co., Ltd. v. Munn* (1) a licence had been given for specified work, but, in doing the work, the builder exceeded the amount authorised by the licence and it was sought to add to the amount of the licence the amount in respect of work which could be done without a licence. The court said that that could not be done, it being held that the allowance of building work permitted without a written licence by virtue of the Control of Building Operations (No. 8) Order, 1947, was only permitted for work severable from specified work for which a written licence had been obtained, i.e., work ordered separately and executed separately. The first point on which the defendant failed before the learned judge was that he failed to establish that this work was within the general controlling words of reg. 56A. Counsel for the defendant relied on the words in Part II of sched. VI to the Defence Regulations, “services for a building” or, possibly, “any other fixed

(1) [1949] 1 All E.R. 616; [1949] 2 K.B. 327.

works of construction or civil engineering, including a road". He (his Lordship) did not think that the work in question came within the words "services for a building", and he also very much doubted whether it came within the word "road", as it occurs in Part II. The work was really clearing away obstructions and making something of the character of a garden path sufficiently wide to take a motor car. The court had very incomplete information before it as to the work which was done and he did not propose to base his decision on that part of the case, because he had come to the conclusion that, assuming the work was work within the general words of reg. 56A, the free allowance was available to cover it on the principles as laid down in *Dennis & Co., Ltd. v. Munn* (1). It was clearly ordered separately. It was plainly not within the specification on which the licence was obtained, and, so far as he could gather from the evidence, it was executed separately. Those latter words were taken from the judgment of DENNING, L.J., in *Dennis & Co., Ltd. v. Munn* ([1949] 1 All E.R. 618). It might well be that work fell outside the principles laid down in *Dennis & Co., Ltd. v. Munn* (1) if it was ordered separately and outside the licence specification although it was executed at the same time. That point should be regarded as open. For these reasons he dismissed the appeal.

**BIRKETT, L.J.**, agreed.

**ROMER, L.J.**, also agreed and said that he would like to associate himself with the observations which SOMERVELL, L.J., had made with regard to the case of *Dennis & Co., Ltd. v. Munn* (1).

*Appeal dismissed.*

Solicitors: *Batchelor, Fry, Coulson & Burder* (for the defendant); *Wilmer Hives & Barren* (for the plaintiff).

G.F.L.B.

(1) [1949] 1 All E.R. 616; [1949] 2 K.B. 327.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSKEY AND PEARSON, JJ.)

Feb. 2, 3, 1953

#### CARNILL v. ROWLAND

*Road Traffic—Driving uninsured vehicle—Ambiguous language of policy—Acceptance of liability by insurers—Road Traffic Act, 1930 (20 & 21 Geo. 5, c. 43), s. 35 (1).*

A cover note insuring the respondent against third-party risks in respect of the use by him of a motor-cycle combination contained the words: "Exclusions and special conditions: sidecar permanently attached". The respondent removed the passenger-carrying sidecar body from the combination, but left the sidecar chassis and wheel in position and drove the combination in that condition. Justices, having heard a representative of the insurers state in evidence that they considered themselves "on risk" at the material time despite the removal of the sidecar body, dismissed an information charging the respondent with driving an uninsured vehicle, contrary to s. 35 (1) of the Road Traffic Act, 1930.

HELD, that, in view of the ambiguous language of the cover note and the acceptance of liability by the insurers, the Divisional Court would not interfere with the decision of the justices.

Per LYNSEY, J.: If a condition in a policy is so broad that it has only one meaning, which is to exclude the insurance company from liability when the machine is used either for certain purposes or under certain conditions, the court is bound by the clause and must act on it. But where the clause is open to two constructions, it is for the court to construe it *contra proferentem*, that is, against the insurance company.

**CASE STATED** by Sheffield justices.

At a court of summary jurisdiction sitting at Sheffield on Sept. 11, 1952, the appellant, George Alfred Carnill, a superintendent of police, preferred an information against the respondent, Tom Rowland, charging that he unlawfully did use on a road a motor cycle there not being in force in relation to the user of the vehicle such a policy of insurance as complied with the requirements of Part II of the Road Traffic Act, 1930, contrary to s. 35 (1) of the said Act.

It was proved or admitted that the respondent signed a proposal form for the insurance of a motor cycle combination by the Co-operative Insurance Society, Ltd. By the terms of the proposal form the policy was to be restricted to the use of a motor cycle to which a sidecar or box carrier was permanently attached, and the seating capacity of the sidecar was said to be two. On July 14, 1952, a cover note was issued to the respondent bearing the words: "Exclusions and special conditions: sidecar permanently attached". On July 16, 1952, the respondent removed the passenger-carrying sidecar body from the motor cycle combination and on the next day he used and drove the vehicle on a road. At this time the passenger-carrying sidecar body had not been replaced and there was attached to the motor cycle only the sidecar chassis and wheel. The insurance company allowed a reduction of the premium payable on the insurance of a solo motor cycle if a sidecar or box carrier was permanently attached because the vehicle was then more stable on the road, particularly when negotiating a left hand bend. The insurance company considered itself on risk and would have indemnified the respondent if he had been involved in an accident while using the vehicle on the occasion in question and in the condition in which it then was.

It was contended on behalf of the appellant (i) that no policy of insurance against third-party risks was in force when the vehicle was used without a sidecar permanently attached; (ii) that no sidecar was attached to the vehicle on July 17, 1952; (iii) that the meaning of the word "sidecar", as defined in the *SHORTER OXFORD DICTIONARY*, was "a car for passengers attachable to the side of a motor cycle"; and (iv) that the test whether the policy of insurance was in force was not whether the insurance company considered itself on risk, but whether it was in law liable to indemnify the user if damage and injury had resulted from the use of the vehicle at a time when no sidecar was permanently attached. It was contended on behalf of the respondent, *inter alia*, that it was within the contemplation of the respondent and the insurance company at the time the insurance was effected that the vehicle could be used without a body being attached to the sidecar and that the policy was not vitiated in any way by the removal of the body, and that, even if a person was doing an illegal act, it did not preclude the insurance company from indemnifying the insured against the consequence of negligent driving. The justices, being of the opinion that the respondent's use of the vehicle on July 17, 1952, was covered by insurance against third-party risks, dismissed the information. The appellant appealed.

*Paul Wrightson* for the appellant.

*R. Stock* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the city

of Sheffield before whom the respondent was charged with unlawfully using a motor cycle on a road, there not being in force in relation to such user of the vehicle a policy of insurance to comply with the Road Traffic Act, 1930.

The court has often pointed out the inconvenience that arises in these cases where a person is charged with using a car when there is not a policy of insurance in force in relation to it owing to the fact that the cases, which sometimes involve nice questions of insurance law, have to be decided in the absence of one of the parties most interested, namely, the insurance company. For that reason it is to be hoped that use will be made of an arrangement that has been entered into with the approval of the appropriate authorities for consultation between the police and insurance companies on the question whether or not the insurance companies are on risk or consider themselves on risk. If a respectable insurance company tells the appropriate authority in a particular instance that they consider themselves on risk, the mischief at which the Road Traffic Act, 1930, is aimed does not arise, for, if an accident had taken place, the company would have indemnified the respondent so that the injured person would recover the money. On the other hand, the court has to give these decisions in the absence of an insurance company, and if this court gives a decision on the construction of the policy, although that decision may have some persuasive effect, it is in no way binding between the insurance company and the assured. If, for instance, in the present case we decided that the insurance company were not on risk, although they have said they were, that would not debar or bind the respondent, if he met with an accident and chose to bring an action against his insurers, seeking a declaration that they were bound to indemnify him.

In this case the respondent made a proposal to the Co-operative Insurance Society, Ltd., for a policy of insurance, and he was asked the question:

"Do you desire the policy to be restricted to the use of any motor cycle to which a sidecar or box carrier is permanently attached?"

and he answered "Yes". Thereupon a cover note was issued pending the issue of the policy. It contained the words: "Exclusions and special conditions: sidecar permanently attached", and, if the sidecar was not attached, presumably liability would thereby be excluded. These exclusions and conditions are put in for the protection of insurance companies. They may take a smaller premium if their risk is limited, and, if the insurance company do not wish to rely on an exclusion or say that in their view the exclusion does not arise in any particular case, I do not know why we should be acute to find that they are wrong. If the insurance company insert exceptions or conditions in the policy, on the ordinary principles of construction those conditions have, so far as possible, to be read against the insurance company.

A sidecar was attached to the respondent's cycle, but when the respondent was stopped the body of the sidecar was not in place. The chassis and the wheel only were in place. A representative of the insurance company was called before the justices. The justices evidently accepted him as a truthful witness, and he told the justices that the company considered themselves on risk. That means no more than that for the purposes of the policy of insurance they regarded what was attached to the cycle as a sidecar. The justices came to the conclusion that the charge was not made out because they thought that the respondent was insured, and I see no reason to differ from them. For my part, I put the matter simply on the ground that, the insurance company having said that what was attached to the cycle satisfied the conditions of the policy, there is no reason to say that the respondent was uninsured at the time he was stopped.



**LYNSKEY, J.:** I agree. It is clear that, if a condition in a policy is so broad that it has only one meaning, and that meaning is to exclude the insurance company from liability when the machine is used either for certain purposes or under certain conditions, the court is bound by that clause and must act on it. But if you have a clause which is open to two constructions, it is for the court to construe that condition in the policy *contra proferentem*, that is, against the insurance company. The question here was whether or not this motor cycle was fitted with a sidecar. What is the meaning of "a sidecar permanently attached" may be a question of doubt. According to the evidence before the justices, the insurance company read the policy as putting them on risk when the cycle was in the condition in which it was found at the time when this offence was alleged to have been committed, namely, fitted with a chassis and a third wheel, but with the body of the sidecar temporarily absent. If that was a construction of the meaning of a sidecar which was impossible on the wording of the policy, one would be able to say that the justices had no right to find as they did, but it seems to me that the meaning of "sidecar permanently attached" is open to two constructions. The insurance company took one and the justices accepted that and also that the insurance company were on risk and the respondent was covered. In those circumstances, I agree that this appeal should be dismissed.

**PEARSON, J.:** I agree. I only want to say that I should agree with the contention of the appellant, set out in the Case Stated, that the test whether the policy of insurance was in force was not whether the insurance company considered itself on risk, but whether it was in law liable to indemnify the user if damage and injury had resulted from the use of the vehicle at a time when no sidecar was permanently attached. If it was plain that there was no sidecar attached to this vehicle at the material time, the view of the insurance company that they were bound would manifestly be incorrect in law and would have to be disregarded. But here it is arguable one way or the other whether or not there was a sidecar attached at the material time. That being so, and it being a reasonable view that the sidecar had not ceased to be a sidecar merely because a part of it had been removed, I think it was right for the justices to take into account the view expressed by the insurance company as one of the material factors for them to consider. For that reason, I think it is not shown that any error was made by the justices in coming to their decision, and I agree with the proposed judgment. *Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *John Heys*, town clerk, Sheffield (for the appellant); *A. J. A. Hanhart*, agent for *Neal, Scolah, Siddons & Co.*, Sheffield (for the respondent).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PEARSON, JJ.)

Feb. 4, 1953

PEARSON v. BOYES

*Road Traffic—Excise licence—"Goods vehicle"—Utility van towing unladen caravan—Vehicles (Excise) Act, 1949 (12, 13 & 14 Geo. 6, c. 89), s. 27 (1).*

Justices dismissed an information against the respondent, who was charged with using a van on a public road as a goods vehicle, i.e., for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable under the Excise (Vehicles) Act, 1949, such higher rate of duty not having been paid, contrary to s. 13 (2) of the Act. The van was a utility van constructed or adapted for the conveyance of goods, and was licensed as a private vehicle. At the material time the respondent was using the van for towing a caravan, and no goods were being carried either in the van or in the caravan.

HELD: that, as the whole scheme of the Act distinguished haulage from carriage, the vehicle was not being used as a goods vehicle at the material time and was not liable to be so taxed, and that, therefore, the decision of the justices was right.

CASE STATED by Lincolnshire (Parts of Kesteven) justices.

At a court of summary jurisdiction sitting at Sleaford on Sept. 15, 1952, the appellant, Reginald Arthur Pearson, an assistant solicitor to the Kesteven County Council, preferred an information against the respondent, Donald Craner Boyes, charging that, on July 15, 1952, while there was then in force a licence taken out for a mechanically propelled vehicle at a certain rate under the Vehicles (Excise) Act, 1949, s. 6 and sched. V, he unlawfully used such vehicle on a public road at Welbourn for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable under the Act, such higher rate not having been paid before the vehicle was so used, contrary to s. 13 (2) of the Act.

It was proved or admitted that the respondent, who was a towing contractor, was the owner of a Bedford utility van which was constructed or adapted for use for the conveyance of goods. On July 15, 1952, he was using the van on Pottergate Road, a public road, for the purpose of towing a caravan. No goods were at the time being carried either in the van or in the caravan. The van was licensed as a private vehicle, duty having been paid at the rate of £10 per annum. If it had been licensed as a goods vehicle, duty would have been chargeable at the rate of £27 10s. per annum, and additional duty at the rate of £10 per annum would have been chargeable in respect of the use of the van for drawing a trailer.

It was contended on behalf of the appellant that, as the van was constructed for the conveyance of goods and was drawing a caravan, it was a "goods vehicle" within the meaning of the Vehicles (Excise) Act, 1949, s. 27 (1). It was contended on behalf of the respondent that the van was not used for the conveyance of goods, and was properly licensed as a private vehicle notwithstanding that it was towing a caravan. The justices dismissed the information and the appellant appealed.

J. P. Ashworth for the appellant.

The respondent did not appear.

LORD GODDARD, C.J.: The vehicle, which was a utility van, and, therefore, could be used for the carriage of goods, was, at the time in question, towing a caravan, which was unladen. Section 27 (1) of the Vehicles (Excise) Act, 1949, provides:

"'goods vehicle' means a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

The question is: If this vehicle was constructed as a goods vehicle, was it being used for the conveyance of goods or burden of any description?

I should be content to decide this case very much on the same lines as this court decided *Cook v. Hobbs* (1), by saying that, if the Revenue authorities want to tax these vehicles, they should get them taxed in clear words. If it becomes necessary to hunt about through a large number of sections and consider a large number of cases, it seems to me to show that the Revenue have not succeeded in obtaining the use of clear and precise words showing that a tax is to be imposed, and a subject is only to be taxed if the taxing authority can show that there is no doubt about the fact that he is taxed. Taking the whole scheme of the Act, the words of the different sections, and the expressions used, I think it is dealing with haulage as something quite distinct from carriage. If one of these utility vans was found being used with a trailer which was laden with goods, it seems to me that it would then be used for the conveyance of goods because, although the goods were in the trailer attached to the van, the van would be conveying them from point to point, although, from one point of view, it could be said that it was conveying a caravan. But here the van was towing an empty caravan. The matter is so vague and so debatable that I cannot see that it has been shown that Parliament intended to tax this vehicle in the way suggested. For these reasons, in my opinion, the decision of the justices should be upheld.

LYNSKEY, J.: I agree.

PEARSON, J.: I agree.

*Appeal dismissed.*

Solicitor: *Treasury Solicitor.*

T.R.F.B.

(1) 75 J.P. 14; [1911] 1 K.B. 14.

# COURT OF APPEAL

(SOMERVELL, BIRKETT AND ROMER, L.JJ.)

Feb. 5, 1953

## PHARMACEUTICAL SOCIETY OF GREAT BRITAIN v. BOOTS CASH CHEMISTS (SOUTHERN), LTD.

*Poison—Sale by retail—Sale by or under supervision of registered pharmacist—Chemist's "self-service" shop—Pharmacist supervising transaction at time of payment—Pharmacy and Poisons Act, 1933 (23 & 24 Geo. 5, c. 25), s. 18 (1) (a) (iii).*

A chemist's "self-service" shop comprised one room around whose walls were shelves on which were laid out certain drugs and medicines specified in Part I of the Poisons List compiled under s. 17 (1) of the Pharmacy and Poisons Act, 1933. These preparations were wrapped in packages and containers with the prices marked on them. A customer entering the shop took a wire basket, selected any articles he required from the shelves, placed them in the basket, and carried them to a cashier at one of the two exits. The cashier then examined the articles the customer wished to purchase, stated the total price, and accepted payment.

At this stage a registered pharmacist, who was authorised by the chemist to prevent the customer from buying any article if he thought fit, supervised the transaction.

**HELD:** the taking of the articles from the shelves constituted an offer by the customer to buy and not the acceptance of an offer by the chemist to sell; the sale was not completed until the customer's offer to buy had been accepted by the defendants by their acceptance of the purchase price; and, therefore, the transaction took place "under the supervision of a registered pharmacist" as required by the provisions of s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933.

Decision of LORD GODDARD, C.J. (1952) (116 J.P. 507), affirmed.

**APPEAL** by the plaintiffs from a judgment of LORD GODDARD, C.J., on a Special Case, dated July 16, 1952, and reported [1952] 2 All E.R. 456.

The defendants carried on business as retail chemists at their shop premises known as 73, Burnt Oak Broadway, Edgware, which were entered in the register of premises kept under s. 12 (1) of the Pharmacy and Poisons Act, 1933. The shop comprised one room so arranged that customers might serve themselves. The main part of the room contained shelves round the walls and on an "island fixture" in the centre, one part being described by a printed notice as "Chemist's Department". On the shelves in the chemist's department were drugs and proprietary medicines displayed in packages and other containers and marked with the retail prices. One section of the department contained exclusively drugs, including proprietary medicines, which were included in or contained substances specified in Part I of the Poisons List referred to in s. 17 (1) of the Act of 1933. No such drugs were displayed for sale in any other part of the shop. When the shop was open for the sale of goods, there was present in the room, among other persons, a registered pharmacist in personal control of the chemist's department subject to the directions of a superintendent in accordance with s. 9 (1) (b) of the Act. A customer entering the shop premises would take an empty wire basket at a barrier, select any article he required from among those on the shelves, place them in the basket, and take them to one of the two exits. At each exit there was a cashier who would examine the articles taken and accept payment of the total price. The pharmacist superintended that part of the transaction involving the sale of a drug which took place at the cash desk, and was authorised by the defendants at that stage, if he thought fit, to prevent any customer from removing any drugs from the premises. On Apr. 13, 1951, two customers purchased articles included in Part I of the Poisons List, following the procedure outlined.

On the question whether each sale was effected by or under the supervision of a registered pharmacist in accordance with s. 18 (1) (a) (iii) of the Pharmacy and Poisons Act, 1933, LORD GODDARD, C.J., held that the sale was effected by the defendants' accepting the customer's offer to buy by accepting payment at the cash desk, and that that sale was conducted under the supervision of a pharmacist, and he gave judgment for the defendants. The plaintiffs appealed.

*Lloyd-Jones, Q.C., and T. Dewar* for the plaintiffs.

*Baker, Q.C., and Everington* for the defendants.

**SOMERVELL, L.J.**, stated the facts and continued: One of the duties of the plaintiffs, the Pharmaceutical Society, who were incorporated by Royal Charter, is to take all reasonable steps to enforce the provisions of the Pharmacy and Poisons Act, 1933. The provision of that Act here in question is s. 18 (1) which provides:

"Subject to the provisions of this Part of this Act, it shall not be lawful



—(a) for a person to sell any poison included in Part I of the Poisons List, unless . . . (iii) the sale is effected by, or under the supervision of, a registered pharmacist."

The point which is taken by the plaintiffs is this. It is suggested that the purchase is complete if and when a customer going round the shelves in this shop of the defendants takes an article and puts it in the receptacle which he or she is carrying, and, therefore, when the customer comes to the pay desk, the registered pharmacist, even if he is so minded, has no power to say: "This drug ought not to be sold to this customer."

I agree with the Lord Chief Justice in everything he said on the matter, but I will put it shortly in my own words. Whether the plaintiffs' contention is right depends on what are the legal implications of the arrangements in this shop. Is the invitation which is made to the customer to be regarded as an offer which is completed so that both sides are bound when the article is put into the receptacle, or is it to be regarded as a more organised way of doing what is already done in many types of shops—and a bookseller is, perhaps, the best example—namely, enabling customers to have free access to what is in the shop, to look at the different articles, and then, ultimately, having taken the one which they wish to buy, to come to the assistant and say: "I want this"? Generally speaking, the assistant will say: "That is all right", the money passes, and the transaction is completed. I agree entirely with what the Lord Chief Justice says and the reasons he gives for his conclusion that in the case of the ordinary shop, although goods are displayed and it is intended that customers should go and choose what they want, the contract is not completed until the customer has indicated the article which he needs and the shopkeeper or someone on his behalf accepts that offer. Not till then is the contract completed, and, that being the normal position, I can see no reason for drawing any different inference from the arrangements which were made in the present case.

The Lord Chief Justice expressed what I consider one of the most formidable difficulties in the way of the plaintiffs' case when he pointed out that, if they were right, once an article has been placed in the receptacle the customer himself is bound and he would have no right, without paying for the first article, to substitute an article which he saw later of the same kind and which he preferred. I can see no reason for implying from this arrangement any position other than that which the Lord Chief Justice found, namely, that it is a convenient method of enabling customers to see what there is for sale, to choose, and, possibly, to put back and substitute, articles which they wish to have, and then go to the cashier and offer to buy what they have chosen. On that conclusion the case fails, because it is admitted that in those circumstances there was supervision in the sense required by the Act and at the appropriate moment of time. For these reasons, in my opinion, the appeal should be dismissed.

**BIRKETT, L.J.:** I am of the same opinion. The short point of the matter is: At what point of time did the sale in this shop take place? My Lord has explained the system which has been introduced into that shop, and, possibly, other shops since. It is said, on the one hand, that when the customer takes the package from the poison section and puts it into her basket the sale takes place there and then. On the other hand, it is said that the sale does not take place until the customer who has placed that package in her basket comes to the exit. The Lord Chief Justice dealt with the matter in this way, and I would like to adopt his words:

"It seems to me, therefore, applying commonsense to this class of transaction, there is no difference merely because a self-service is advertised. It is no different really from the normal transaction in a shop . . . I am quite satisfied it would be wrong to say the shopkeeper is making an offer to sell every article in the shop to any person who might come in and that he can insist by saying: 'I accept your offer'."

Then he goes on to deal with the illustration of the bookshop and continues:

"Therefore, in my opinion, the mere fact that a customer picks up a bottle of medicine from the shelves in this case does not amount to an acceptance of an offer to sell. It is an offer by the customer to buy. I daresay this case is one of great importance, it is quite a proper case for the Pharmaceutical Society to bring, but I think I am bound to say in this case the sale was made under the supervision of a pharmacist. By using the words: 'The sale is effected by, or under the supervision of, a registered pharmacist', it seems to me the sale might be effected by somebody not a pharmacist. If it be under the supervision of a pharmacist, the pharmacist can say: 'You cannot have that. That contains poison'. In this case I decide, first that there is no sale effected merely by the purchaser taking up the article. There is no sale until the buyer's offer to buy is accepted by the acceptance of the money, and that takes place under the supervision of a pharmacist. And in any case, I think, even if I am wrong in the view I have taken of when the offer is accepted, the sale is by or under the supervision of a pharmacist."

I agree with that and I agree that this appeal ought to be dismissed.

**ROMER, L.J.:** I also agree. The Lord Chief Justice observed that if, on the footing of the plaintiff society's contention, a person picked up an article, once having picked it up he would never be able to put it back and say he had changed his mind, for the shopkeeper could say that the property had passed and the customer would have to pay. If that were the position in this and similar shops, and that was known to the general public, I should imagine the popularity of such shops would wane a good deal. I am satisfied that that is not the position, and that the articles, even though they are priced and put in shops like this, do not represent an offer by the shopkeeper which can be accepted merely by the picking up of the article in question. I agree with the reasons on which the Lord Chief Justice arrived at that conclusion, to which **BIRKETT, L.J.**, has just referred, and to those observations I can add nothing of my own.

*Appeal dismissed.*

Solicitors: *A. C. Castle* (for the plaintiffs); *Masons* (for the defendants).

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PEARSON, JJ.)

Feb. 5, 1953

BROWN v. ALLWEATHER MECHANICAL GROUTING CO., LTD.

*Road Traffic—Excise licence—Use of vehicle for purpose not covered by licence—Excise penalty provided by statute—No offence punishable on summary conviction created—Vehicles (Excise) Act, 1949 (12, 13 & 14 Geo. 6, c. 89), s. 13 (2).*

Where a person uses on a road a vehicle licensed as a goods vehicle for a purpose in respect of which a higher rate of duty is chargeable, and that higher rate has not been paid, contrary to s. 13 (2) of the Vehicles (Excise) Act, 1949, he does not commit an offence punishable on summary conviction, as there are no words in that sub-section referring to summary conviction or summary trial, or indicating that a criminal offence is created. He merely renders himself liable to an excise penalty recoverable by way of complaint before justices, and, accordingly, no person can be convicted under s. 5 of the Summary Jurisdiction Act, 1848, of aiding and abetting the commission of a summary offence in respect of such case.

CASE STATED by Oxfordshire justices.

At a court of summary jurisdiction sitting at Woodstock, the appellant, Norman George Brown, an inspector of the Oxfordshire Constabulary, preferred an information against the respondents, Allweather Mechanical Grouting Co., Ltd., charging that they on June 18, 1952, did unlawfully aid, abet, counsel and procure one Joseph Cassidy in the commission of a summary offence, that is to say, in contravention of the Vehicles (Excise) Act, 1949, s. 13 (2), while there was then in force a certain licence taken out for a mechanically propelled goods vehicle at a certain rate, he did unlawfully use such vehicle on a road for a purpose which brought it within a class or description of vehicle to which a higher rate of duty was chargeable, such higher rate not having been paid before the vehicle was so used, contrary to the Summary Jurisdiction Act, 1848, s. 5.

It was contended on behalf of the respondents as an objection preliminary to the hearing that the Vehicles (Excise) Act, 1949, did not create an offence which was punishable on summary conviction; that the respondents could not, therefore, be convicted of aiding and abetting such offence, contrary to the Summary Jurisdiction Act, 1848, s. 5; and that, if there had been a breach of the regulations whereby the local licensing authority had been deprived of a certain amount of revenue, the appropriate remedy was by way of an excise penalty against the party liable.

The justices upheld the preliminary objection and dismissed the information.

J. P. Ashworth for the appellant.

Roland Brown for the respondents.

LORD GODDARD, C.J.: This is a Case stated by justices for the county of Oxford, before whom the respondents were charged that they

"did unlawfully aid, abet, counsel and procure one Cassidy in the commission of a summary offence, that is to say, in contravention of s. 13 (2) of the Vehicles (Excise) Act, 1949, while there was then in force a certain licence taken out for a mechanically propelled vehicle, namely, a goods vehicle, at a certain rate he did unlawfully use such vehicle on a certain public road called the Woodstock to Chipping Norton road for a purpose which brought it within a class or description of vehicle to which

a higher rate of duty was chargeable, such higher rate not having been paid before the vehicle was so used, contrary to s. 5 of the Summary Jurisdiction Act, 1848."

Counsel for the respondents has taken a point of great importance, and the court is indebted to him for doing so, as this point appears not to have occurred to anybody before though there have been plenty of proceedings under the section in question in circumstances I will mention in a moment. His point was that the Vehicles (Excise) Act, 1949, s. 13 (2), did not create an offence punishable on summary conviction, and it follows that, if that is so, s. 5 of the Summary Jurisdiction Act, 1848, which provides for the punishment of aiders and abettors of summary offences, has no application. Concisely stated, the argument of counsel for the respondents was that the sanction provided by the Act for using a vehicle which has one class of licence attached to it for a purpose which would require a different class of licence is a monetary penalty which can be recovered in various forms of proceedings, but the Act does not create an offence in the sense that it is punishable as a criminal offence, although a penalty may be recovered in what would generally be called penal proceedings. It is true that, if the word "penalty", as distinct from the word "fine", is used in a section, the general rule is that the penalty must be sought and recovered as a debt in a civil court, whereas a fine is a penalty imposed by a criminal court, and a fine always goes to the Crown.

In the present case there was alleged to have been an offence against s. 13 (2) of the Vehicles (Excise) Act, 1949. It is observable that this is an excise Act, and, therefore, the Excise Management Act, 1827, applies to proceedings under it. Under the Act of 1949 a person using a motor vehicle for a purpose for which it is not licensed and which would attract a higher rate of licence, is made liable to an excise penalty of £20 or an excise penalty of an amount equal to three times the difference between the duty actually paid on the licence and the amount of duty at the higher rate. There are no words in s. 13 (2) which refer to summary conviction or summary trial, or to fines, or anything to indicate that a criminal offence is created. In s. 15 of the Act, which refers to using vehicles without a licence at all, a similar penalty is imposed, that is, an excise penalty of £20 or an excise penalty "equal to three times the amount of the duty chargeable". Section 15 (2) provides:

"Proceedings for a penalty under the last foregoing sub-section may be brought at any time within a period of twelve months from the date on which the offence was committed."

There, the word "offence" is used. A further provision in sub-s. (3) (a) obliges the owner of the vehicle to give such information as he may be required

"... by or on behalf of a chief officer of police or a county council ... as to the identity of the driver and of any person using the vehicle and, if he fails to do so, shall be guilty of an offence under this sub-section, unless he shows to the satisfaction of the court that he did not know and could not with reasonable diligence have ascertained who was driving or using the vehicle; and (b) any other person shall, if required as aforesaid, give any information which it is in his power to give ..."

In sub-s. (4) it is provided:

"A person guilty of an offence under the last foregoing sub-section shall be liable on summary conviction to a fine not exceeding £20."



Therefore, if a person fails to give the information when he is asked for it, that is made by the statute an offence and the word "fine" is used, not "penalty". We are not considering s. 15 in the present case, but counsel for the appellant rightly drew our attention to s. 15 (1) because the subject-matter is very much the same as that of s. 13 (2). The penalty, also, is similar. It is true that it is provided in s. 15 (2) that "proceedings . . . may be brought at any time within a period of twelve months from the date on which the offence was committed". In other words, the Act is imposing an express term of limitation of twelve months. Years ago, under the old statutes, a debt created by a statute was regarded as a specialty debt, and for the present purpose a special period of limitation is provided. I do not think the mere fact that the word "offence" is used there shows that it is to be regarded as a criminal offence. A failure to do something prescribed by a statute may be described as an offence although Parliament imposes in respect of it, not a criminal sanction, but a mere pecuniary sanction which is recoverable as a civil debt. Justices, as is well known, have in many cases power to order the recovery of sums of money. If one turns to s. 65 of the Excise Management Act, 1827, one finds that excise penalties may be recovered before justices of the peace, but there is no indication in the section that the justices are able to imprison or to impose a fine. It simply gives them power to inquire into the matter and give judgment for penalties. Of course, if the penalties are not paid, there may be proceedings under the Debtors Act or other Acts—possibly, under the Summary Jurisdiction Acts—and there may be a commitment to prison, but that is not a punishment for the offence itself. It is a punishment for not paying the penalty, or a means of endeavouring to compel a defendant to pay a penalty, which is a different matter.

Passages in the judgment of the Master of the Rolls in *A.-G. v. Bradlaugh* (1), to which counsel for the respondents has directed our attention, support his argument. SIR WILLIAM BRETT, M.R., pointed out that where a penalty is imposed for doing a particular act, the penalty is the only sanction, and the imposition of the penalty, if it is the only consequence, does not make the prohibited act a crime. It was far more common in earlier days than it is nowadays to prohibit certain acts and to impose as the sanction a penalty which often could be recovered by a common informer. There were many Acts on the statute book till the Common Informers Act, 1951, was passed to abolish that particular form of public nuisance, which provided for the recovery of penalties. A well known class of case was created by the Sunday Observance Act, 1780, under which, if a person promoted a public entertainment or amusement on a Sunday, in certain circumstances he was liable to a penalty for which he could be sued, but no one ever said that that was a criminal act. Whether it would be desirable to make these penalties criminal acts, or not, I do not know, nor need I discuss the matter, but, in my opinion, an excise penalty is something quite different from a fine. It is recoverable before justices, and it ought to be recovered by way of complaint. I would add this. Many people who see this case may think that they have been wrongly ordered to pay, but this is not a case in which this court will encourage anybody to apply for a free pardon on the ground that he was convicted of something of which he was not guilty. It may be he has been ordered to pay in a proceeding begun by information when it ought to have been begun by complaint. That is the

(1) (1885), 49 J.P. 500; 14 Q.B.D. 667.

only objection, and, if he has done the prohibited act, he has incurred the penalty which has been imposed. In my opinion, the justices came to a right decision in point of law, and, therefore, this appeal fails.

LYNSKEY, J.: I agree.

PEARSON, J.: I agree.

*Appeal dismissed.*

Solicitors: *Treasury Solicitor* (for the appellant); *Cripps, Harries, Hall & Co.* (for the respondents).

T.R.F.B.

# CHANCERY DIVISION

(DANCKWERTS, J.)

Jan. 28, 29, 1953

## BRITISH ELECTRICITY AUTHORITY AND ANOTHER v. EXETER CORPORATION

*Electricity—Nationalization—Local authority as authorized undertakers—Financial adjustments—Sum wrongly transferred to aid of rate—Liability to remit—Exeter Corporation Act, 1935 (25 and 26 Geo. 5, c. cii) s. 112—Electricity Act, 1947 (10 and 11 Geo. 6, c. 54), s. 14 (1).*

Under the Exeter Corporation Act, 1935, the corporation carried on various undertakings including the supply of electricity for their area. By s. 108 (1) of the Act all the receipts and expenses of the corporation's undertakings were to be paid into and out of the general rate fund. By s. 109 (1) separate accounts were to be kept in respect of each of the undertakings from which revenue was derived, and were to show "under a separate heading or division on the one side all receipts in respect of the undertaking . . . and on the other side all payments and expenses in respect of the undertaking". As regards the electricity undertaking, s. 112 (1) (b) provided that, if in any one year there was a surplus of revenue over expenditure and if the reserve fund amounted to more than one-twentieth of the aggregate capital expenditure, "such sum as the corporation may think fit (not being less in cases where the said excess of receipts over expenses is more than a sum equal to 1½ per cent. of the outstanding debt than the difference between the said excess and that sum) shall be credited to the revenue account of the undertaking for the next following year . . ." In the revenue account of the electricity undertaking for the year ending Mar. 31, 1947, the credit side showed a sum of £40,000 as "reserve written back" on account of sums set aside for the years 1942-1945 as a contingent reserve against liability for war damage insurance. On the debit side was shown a contribution of £830 in aid of rate, representing 1½ per cent. on the amount of the outstanding debt and a sum of £33,355 which had been treated as a transfer in aid of rate. A sum of £37,099 was carried forward as a credit balance to the revenue account for the year ending Mar. 31, 1948. On Apr. 1, 1948, under the Electricity Act, 1947, s. 14 and s. 15, the electricity undertaking vested partly in the British Electricity Authority and partly in the South Western Electricity Board and by s. 14 (2) (iii) and s. 15 (1) all investments and cash previously held by the corporation as electricity undertakers vested in the British Electricity Authority. The authority claimed the sum of £33,355 on the ground that the transfer of that sum in aid of rate, by the corporation, was a breach of statutory duty, whereby the amount standing to the credit of the revenue account at Mar. 31, 1948, was wrongly reduced by that sum. The corporation contended, inter alia, that the sum of £40,000 which had been set aside on account of contingent liability for war damage

insurance should not have been brought into the revenue account, but ought to have been treated as coming back into the general rate fund.

**HELD:** (i) the sum of £40,000 which had been set aside for war damage insurance represented revenue of the undertaking originally and was rightly brought back into the revenue account when it was no longer required for the contingent liability, and it formed part of the revenue of the year into which it was brought back.

(ii) under s. 112 (1) (b) of the Act of 1935 the whole of the excess of revenue over expenditure in any given year was to be carried over to the following year and to be deemed to be revenue of that following year and the only amount that might be carried to the aid of rates was the 1½ per cent on the outstanding debt, and, therefore, the sum of £33,355 ought to have been carried over to the year ending Mar. 31, 1948, as revenue of that year in addition to the sum of £37,099 which was, in fact, carried forward. Accordingly the corporation were accountable for the sum of £33,355.

Observations of LORD GREENE, M.R., in *Allchin v. Coulthard* (1942) (106 J.P. 221), considered.

**ACTION** by the British Electricity Authority and the South Western Electricity Board for, inter alia, (a) a declaration that, in determining the amount of the assets held by the defendants, Exeter Corporation, immediately before Apr. 1, 1948 (the vesting date for the purposes of the Electricity Act, 1947), there should be included therein a sum of £33,355, being an amount unlawfully transferred by the corporation from their electricity undertaking, and (b) a declaration that, in so far as the corporation had unlawfully done any act in consequence of which the revenues of their electricity undertaking or the assets to be transferred to the plaintiffs, or one or other of them, on Apr. 1, 1948, were less than they otherwise would have been, the corporation were liable to pay the amount of such deficiency either by way of damages or otherwise to the plaintiffs.

The sum of £33,355 was debited from the corporation's revenue account in respect of their electricity undertaking for the year ended Mar. 31, 1947, and treated as a transfer in aid of rate. The plaintiffs contended that, under the Exeter Corporation Act, 1935, s. 112 (1) (b), this sum should have been carried forward to the credit of the revenue account of the undertaking for the following year, and that, as a result of the corporation's action in transferring the sum in aid of rate, in breach of the statutory duty, the revenue account of the undertaking at Mar. 31, 1948, and the assets vesting in the plaintiffs on Apr. 1, 1948, under the Electricity Act, 1947, were reduced by that sum. The corporation contended, inter alia, that, under s. 108 (1) of the Act of 1935, all moneys from time to time received by them on account of the revenue of their electricity undertaking were carried to and formed part of their general rate fund and became merged therein and ceased to be identifiable.

*Willis, Q.C.*, and *Teague* for the plaintiffs.

*Sir Andrew Clark, Q.C.*, and *Denys B. Buckley* for the corporation.

**DANCKWERTS, J.:** This is an action by the British Electricity Authority and the South Western Electricity Board as plaintiffs. Both those bodies came into being by virtue of the Electricity Act, 1947, which vested certain assets previously belonging to electrical undertakers in new bodies, who came into operation on Apr. 1, 1948, the appointed day for the purposes of the Act. The defendants, Exeter Corporation, were electrical undertakers before the Act came into operation. The action is concerned with the assets which, under the provisions of the Act, the plaintiffs, or one of them, became entitled to take over from the corporation as the previous undertakers. The South Western Electricity Board have only been joined with the British Electricity Authority as plaintiffs because of a possible doubt whether all of the assets under consideration vested in the British Electricity Authority, as certain

kinds of assets vest in the board and not in the authority. Nothing, however, turns on that and I need not consider the matter further.

The Electricity Act, 1947, s. 14, which is concerned with the vesting of assets of electricity undertakings provides:

"(1) Subject to the provisions of this Part of this Act all property, rights, liabilities and obligations which, immediately before such date as may be appointed by order of the Minister (in this Act referred to as 'the vesting date') [Apr. 1, 1948] were property, rights, liabilities and obligations of a body to whom this Part of this Act applies, shall on the vesting date vest by virtue of this Act and without further assurance in such electricity board or boards as may be specified in the following provisions of this section or determined thereunder . . . (2) Subject to the provisions of this section relating to the North of Scotland District—(a) the property, rights, liabilities and obligations mentioned in sub-s. (1) of this section of the Central Electricity Board, any power station company and any electricity holding company, shall vest in accordance with the said sub-s. (1) in the central authority; (b) the property, rights, liabilities and obligations aforesaid of any authorised undertakers to whom this Part of this Act applies (other than the Central Electricity Board) shall vest as aforesaid in such one of the area boards as may be determined by order of the Minister: Provided that—(i) all generating stations of any such authorised undertakers and all main transmission lines of such undertakers, being lines connecting a generating station directly with another generating station or with any main transmission lines of the Central Electricity Board, and all property and rights held or used by the undertakers wholly or mainly for the purposes of such stations and transmission lines and all liabilities and obligations wholly or mainly incurred by the undertakers for those purposes; (ii) all rights, liabilities and obligations under agreements between any authorised undertakers and any railway undertakers for the supply of electricity to the railway undertakers for the purposes of haulage or traction, and all transmission lines used wholly or mainly for the purpose of giving a supply to any railway undertakers for the purposes of haulage or traction; and (iii) all investments and cash of any such undertakers and all rights and liabilities thereof in respect of income tax and excess profits tax; shall vest in the central authority and not in an area board."

Difficulties arise in the present case with regard to the question of what vested in the plaintiffs under the Act of 1947 by reason of the fact that the corporation carried on, not only the electrical undertaking, but all the other activities which are normally carried on by a local authority. Therefore, it is necessary for the purposes of the Act to ascertain what part of the assets which were vested in the local authority are to be attributed to the electricity undertaking, and should, accordingly, be treated as vesting in the plaintiffs. Section 15 of the Act provides:

"(1) In the case of any authorised undertakers being a local authority the provisions of the last foregoing section shall only apply to property held or used by the local authority wholly or mainly in their capacity as authorised undertakers, and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity, and accordingly references in that section to the property, rights, liabilities and obligations of a body to whom this Part of this Act applies, or to any agreement to which any such body was a party, or to documents referring to any such



body, or to legal proceedings or applications by or against any such body shall be construed as references to property held or used by the local authority wholly or mainly in their capacity as authorised undertakers and rights, liabilities and obligations acquired or incurred by the local authority in the said capacity or, as the case may be, to agreements, documents, legal proceedings or applications of or relating to the local authority in their capacity as authorised undertakers . . . (3) Any question arising under this section as to whether any property is or was held or used by any such local authority wholly or mainly in their capacity as authorised undertakers, or whether any property is or was (for the purposes of the last foregoing sub-section) held or used partly in the said capacity and partly in other capacities, or whether any rights, liabilities or obligations were acquired or incurred by any such local authority in the said capacity or whether any agreements or documents relate or related to any such local authority in their capacity as authorised undertakers, shall, in default of agreement, be determined by the Minister of Health, and he shall have regard to whether or not entries relating to any property, rights or liabilities were or ought to have been included in accounts furnished by the local authority to the Electricity Commissioners under s. 9 of the Electric Lighting Act, 1882."

In the present case the procedure laid down by s. 15 (3) was not adopted because it was considered that the question was not exactly whether certain things shown in the accounts were assets for the purposes of s. 15, but whether certain things, which ought not to have been done, had been done by the local authority in such a way as to reduce the amount of assets which appeared to be available for transfer.

The question for decision lies in a comparatively small compass, but it is of considerable difficulty. It arises on the accounts which have been kept by the defendant corporation. It is claimed that a sum which appears in the corporation's account, headed "Net Revenue Account, Mar. 31, 1947", being a sum of £33,355, stated to be a "transfer in aid of rate", was wrongly transferred out of the account and should have been retained as part of the balance carried forward for the following year. Before considering how that is to be dealt with, it is necessary to deal with the position under the statutory provisions relating to electricity undertakings. The original Act dealing with these matters was the Electric Lighting (Clauses) Act, 1899. Section 7 (1) of the schedule to the Act, which is one of the provisions deemed to be incorporated in the statutory provisions relating to the undertaker, is in these terms:

"Where a local authority are the undertakers the following provisions shall have effect:—(1) All moneys received by the undertakers in respect of the undertaking, except (a) borrowed money, (b) money arising from the disposal of lands acquired for the purposes of the special order, and (c) other capital money received by them in respect of the undertaking, shall be applied by them as follows:—(a) In payment of the working and establishment expenses and cost of maintenance of the undertaking, including all costs, expenses, penalties, and damages incurred or payable by the undertakers . . . their officers or servants, in relation to the undertaking; (b) In payment of the interest or dividend on any mortgages, stock, or other securities granted and issued by the undertakers in respect of money borrowed for electricity purposes; (c) In providing any instalments or sinking fund required to be provided in respect of moneys borrowed for electricity purposes; (d) In payment of all other their expenses of

executing the special order not being expenses properly chargeable to capital; (e) In providing a reserve fund, if they think fit, by setting aside such money as they think reasonable . . ."

in the manner mentioned. After certain provisions as to reserve funds, s. 7 (1), as amended by the Electricity (Supply) Act, 1926, s. 43 and sched. V, continues as follows:

"The undertakers shall apply the net surplus remaining in any year and the annual proceeds of the reserve fund when amounting to the prescribed limit—(a) in reduction of the charges for the supply of energy; or (b) in reduction of the capital moneys borrowed for electricity purposes; or (c) with the consent of the Electricity Commissioners in payment of expenses chargeable to capital; or (d) in aid of the local rate. Provided that—(i) the amount which may be applied in aid of the local rate in any year shall not exceed  $1\frac{1}{2}$  per cent. of the outstanding debt of the undertaking; and (ii) after Mar. 31, 1930, no sum shall be paid in aid of the local rate unless the reserve fund amounts to more than one-twentieth of the aggregate capital expenditure on the undertaking. Any deficiency of income in any year when not answered out of the reserve fund shall be charged upon and payable out of the local rate."

Those provisions applied to the defendant corporation until the passing of the Exeter Corporation Act, 1935, one of a series of local Acts passed about that time for the purpose of assisting local authorities to gain some benefits in respect of payments of income tax in regard to interest which they might have to pay to other persons. The material provisions of the Act of 1935 begin, for the purposes of this case, with s. 108 (1), which provides:

"Notwithstanding anything contained in any previous enactment all money received by the corporation whether on capital or revenue account including (but without prejudice to the generality of this provision)—(a) all money received by the corporation on account of the revenue of any undertaking of the corporation as from time to time existing from which revenue is derived; and (b) interest and other annual proceeds from time to time received by the corporation on the investments or balances forming part of any fund accumulated for the redemption of debt or as a reserve . . . or other similar fund . . . shall be carried to and form part of the general rate fund and all payments and expenses made and incurred by the corporation in respect of any such undertaking or in carrying into execution the powers and provisions of this or any other Act whether public or local (including interest on moneys borrowed by the corporation and all sums required by law to be paid or transferred or which the corporation may determine to pay apply or transfer to any such fund as is referred to in para. (b) of this sub-section) shall be paid or transferred out of the general rate fund."

It is thus plain that all the receipts of the corporation from its various operations and activities are to be paid into the general rate fund and will form part of that fund. On the other hand, all payments that have to be made by the corporation will have to be paid out of that fund.

Section 109 provides for the keeping of accounts. Section 109 (1) is:

"The corporation notwithstanding the provisions of any Act or order to the contrary shall keep their accounts so as to distinguish capital from revenue and shall keep separate accounts in respect of each of the undertakings of the corporation as from time to time existing from which revenue

is derived (each of which is in this section separately referred to as 'the undertaking') and as to revenue shall show under a separate heading or division on the one side all receipts in respect of the undertaking (including the income from any such fund as is referred to in [s. 108 (1) (b)] of this Act provided in connection with the undertaking) and on the other side all payments and expenses in respect of the undertaking such payments and expenses being divided so as also to show the amounts representing . . ."

The various matters which are to be shown in the account are then set out in paras. (a) to (f). Section 110 contains certain provisions as to the application of the revenue of the corporation's undertakings, and s. 111 provides for reserve funds. Section 112 (1), which is the vital sub-section for the purposes of the present action, is:

"In lieu of the provisions of s. 7 (1) of the schedule to the Electric Lighting (Clauses) Act, 1899, and of the amendments to that sub-section set out in sched. V to the Electricity (Supply) Act, 1926, the following provisions shall apply with respect to the electricity undertaking (in addition to the provisions of the section of this Act [s. 10] of which the marginal note is 'Application of revenue of undertakings') (namely):—If in any year the moneys received by the corporation on account of the revenue of the undertaking (including the interest and annual proceeds received by the corporation in that year on the investments representing or forming part of any such fund as is referred to in [s. 108 (1) (b)] of this Act of which the marginal note is 'Receipts and expenses' and as is provided in connection with the undertaking) shall exceed the aggregate of the moneys paid or expended by the corporation in respect of the undertaking for the several purposes mentioned in paras. (a) to (f) of sub-s. (1) of the section of this Act [s. 109] of which the marginal note is 'Accounts' then—(a) if the reserve fund in respect of the undertaking does not amount to more than one-twentieth of the aggregate capital expenditure for the time being on the undertaking a sum equal to the amount of such excess shall be credited to the revenue account of the undertaking for the next following year and the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the said excess; (b) if the said reserve fund amounts to more than one-twentieth of the said aggregate capital expenditure such amount as the corporation may think fit (not being less in cases where the said excess of receipts over expenses is more than a sum equal to  $1\frac{1}{2}$  per centum of the outstanding debt of the undertaking than the difference between the said excess and that sum) shall be credited to the revenue account of the undertaking for the next following year and the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the amount so deemed to be revenue."

Section 112 (2) contains a provision in regard to the reserve fund. Section 112 (3) is:

"Section 7 (1) of the schedule to the Electric Lighting (Clauses) Act, 1899, shall be deemed to have ceased to be incorporated with any of the Acts or orders relating to the electricity undertaking."

Therefore, it is plain that, after the Exeter Corporation Act, 1935, came into force, the provisions of s. 7 (1) of the Electric Lighting (Clauses) Act, 1899,

no longer applied, and, for the present purposes, the situation is regulated entirely by the terms of s. 112 of the Act of 1935.

I can now return to the accounts of the corporation. In the revenue account of Mar. 31, 1947, of the electricity undertaking, on the right-hand side are the credits, being, first, the balance on Mar. 31, 1946, brought forward in accordance with s. 112 (1) of the Act of 1935, and amounting to £42,161 8s. [After mentioning various items on the credit side, His LORDSHIP said:] Finally, there is an item "War Damage Insurance: Reserve written back, £40,000", which requires a word of explanation. Undertakings of this kind were exempted from the provisions of the War Damage Act, 1943, on the supposition that separate provisions were intended to be made by Parliament to deal with those cases, and eventually provision was made by the War Damage (Public Utility Undertakings, Etc.) Act, 1949. In the meantime, in each of four war years ending in 1945, the corporation had set aside from revenue a sum of £10,000 as a contingent reserve against the liability which might arise in the future under such statutory provisions as were envisaged by the Act of 1943. In March, 1947, that £40,000, the accumulation of four years, was treated as no longer needed for the purpose and was brought back as a credit in the revenue account of Mar. 31, 1947. The credit items of that account come to a total of £92,805 17s. [After mentioning various items on the debit side, His LORDSHIP said:] We then come to the item of £33,355, which is treated as a transfer in aid of rate. It is further described in the balance sheet as

"Balance of contributions 1926/27-1942/43. Electricity (Supply) Act, 1926 (sched. V), as amended by Exeter Corporation Act, 1935 (s. 112)."

It is, therefore, treated as though it represented contributions over a number of years. But in the argument before me that allocation was abandoned, and it was simply argued on the footing that this was a transfer in March, 1947, of £33,355 from the revenue account in respect of the electricity undertaking to the benefit of the rates. Then there is a contribution, in aid of rate for 1946/47, of £830, which represents the  $1\frac{1}{2}$  per cent. on the amount of the outstanding debt according to the provisions which were set out in s. 112 (1) (b) of the Act of 1935. The result is that the debits show a credit balance to make up the total of £37,099 0s. 4d., which was carried forward to the following year ending on Mar. 31, 1948. The contention of the plaintiffs is that the transfer of £33,355 in aid of rate was not authorised and was a breach of the corporation's duty under the Act of 1935, and, therefore, that the balance carried forward ought to have been some £70,000 instead of being merely some £37,000.

In the account for Mar. 31, 1948, which relates to a period ending immediately before the appointed day, there is credited the sum of £37,099 odd, and various other items. On the debit side there is a loss of £21,963 15s. 3d., and there are items, "Contribution in aid of rate for 1947/48, £800", and "Contributions in aid of rate for 1948/49"—which would be after the date of the transfer under the Electricity Act, 1947—"£1,000". That leaves a balance of £15,410 9s. 7d. The plaintiffs obtained the benefit only of that sum of £15,410 9s. 7d., instead of, as they contend should be the case, a sum larger by a considerable amount. As regards the two items amounting to £1,800, it was contended, originally, that the £1,000 was quite unauthorised as being in regard to a future year. But on examination of the figures it appears that, if one takes the amount of the debt at the end, and not at the beginning, of the financial year 1947/48,  $1\frac{1}{2}$  per cent. of that amount would allow a figure of £1,930 to be transferred, and, therefore, if that was the correct date to take,



these two payments could, possibly, be justified, not, indeed, as partly a payment in respect of the year 1948/49, but within a figure of £50 in respect of the year 1947/48. I do not see any reason why the corporation should not take the amount standing at the end of their financial year as the basis for their figure for calculating the  $1\frac{1}{2}$  per cent. Therefore, I do not propose to trouble further about those two amounts of £800 and £1,000, because that would be the amount allowed, on that view, to be transferred to the rates. It is also to be observed that, in the final balance sheet of the undertaking on Mar. 31, 1948, on the basis of which the transfer to the electricity authority was actually made, there are these items to be considered. In the revenue account there are on one side investments amounting to £95,500, which represents a reserve fund, and there are stock and stores in hand and sundry debtors, the benefit of which was transferred to the British Electricity Authority. On the other side there are sundry creditors amounting to £99,225, reserve and renewals amounting to £96,000 odd, the sum of £15,410 9s. 7d., which came from the net revenue account which I have just been dealing with, and there is an overdraft described as "Cash due to bank" amounting to £54,463 12s. 8d. On the basis that there was an overdraft which was owing by the electricity undertaking of the corporation and which had, therefore, to be borne by the British Electricity Authority on the transfer, the electricity authority made a payment to the corporation to discharge that sum, with a reservation that such payment was made before the account had been examined in order to prevent further bank interest being incurred.

I now come to the questions which have to be decided in this case. The plaintiffs contended that the corporation were in breach of their statutory duties in not carrying over the sum of £33,355, and they claimed that they were entitled to be recouped the loss which they had suffered by reason of the breach. The corporation contended, first, that the items in the accounts were merely matters of book entries, that all moneys received by them were paid into the general rate fund and ceased to be identifiable, and, therefore, one could not say that there was any actual cash which was attributable to the electricity undertaking rather than to any other particular activity of the corporation. The corporation further contended that, as the Act of 1935 contained no such provisions as those in the provisos to s. 7 (1) of the schedule to the Electric Lighting (Clauses) Act, 1899, as amended by the Act of 1926, there was nothing to prevent them paying over, in aid of the rate fund, part of the surplus of revenue over the outgoings in any particular year. Their final contention was that the £40,000, which was brought back from what might be termed a special reserve fund in respect of war damage contingency, should not have been brought into the revenue account, but should have been treated as coming back into the general rate fund, and, therefore, it formed no part of any balance which ought to be carried forward from 1947 to 1948 in regard to their electricity undertaking.

I was referred to certain authorities, including a number of cases with regard to gas undertakings. I do not think that the authorities relating to gas undertakings assist in the present case, as there were no similar provisions in regard to gas undertakings as those in the Act of 1935. There are, however, two cases in regard to electricity undertakings which I should mention in regard to the present matter. In *Reg. v. Minister of Housing & Local Government. Ex p. Hove Corpn.* (1) a local authority had in the bank, at the vesting date, a sum of £17,520, which they had received from transactions in their capacity

(1) (1952), 116 J.P. 498.

as electricity undertakers and had carried to the general rate fund of the borough under the Local Government Act, 1933, s. 185, and included in that fund immediately before the vesting date. It was held that this sum was surplus net revenue which the local authority were not entitled to use for general purposes of rate reduction except to the limited extent authorised by the Electric Lighting (Clauses) Act, 1899, sched., s. 7, as amended; that they held the balance in their capacity as undertakers and in no other capacity; and that it constituted property or rights acquired by the local authority wholly or mainly in their capacity as authorised undertakers within the meaning of the Electricity Act, 1947, s. 15 (1), and, accordingly, vested in the British Electricity Authority. That case depended on the Electric Lighting (Clauses) Act, 1899, sched., s. 7 (1), proviso (i), which contained a prohibition of the transfer to the benefit of the rates of more than  $1\frac{1}{2}$  per cent. of the outstanding debt of the electricity undertaking. That was a very definite provision which, it seems to me, would prevent the general rate fund acquiring the benefit of the sum in question to the exclusion of the electricity undertaking of the local authority. It seems to me, therefore, that the *Hove* case (1) cannot affect the matter which I have to consider, and I do not find that it helps me.

*Allchin v. Coulthard* (2), which is of importance, was a decision in regard to the South Shields Corporation, who had an electricity undertaking and a local Act not dissimilar from the local Act of the Exeter Corporation. That was a case in regard to income tax, and the decision of the Court of Appeal, which was in favour of the local authority, was affirmed by the House of Lords, who expressly approved the judgment of LORD GREENE, M.R. The principle of the decision of the Court of Appeal in that case is that the phrase "profits or gains brought into charge", as used in r. 19 and r. 21 of the General Rules Applicable to All Schedules to the Income Tax Act, 1918, does not indicate the cash resources out of which the payment of the interest is in fact made, but a fund in the accountancy sense of taxed profits up to but not exceeding the amount of the assessment ascertained for the purpose of an account between the taxpayer and the revenue and deemed to be in his hands, to which the payment of the interest is to be debited, and that no profits which cannot be lawfully applied to the payment of the interest can be treated by the taxpayer as forming this fund or any part of it, but that, subject to this, apart from special circumstances (instances of which are provided by *Birmingham Corpn. v. Inland Revenue Comrs.* (3) and *Central London Ry. Co. v. Inland Revenue Comrs.* (4)), the taxpayer is entitled to treat the interest as having been paid out of that fund, no matter out of what cash resources he paid it. The facts of the case were as follows. South Shields Corporation paid out of their general rate fund, which consisted partly of untaxed income (namely, the rates collected) and partly of profits from its undertakings duly assessed to income tax, interest on a loan raised for the purpose of their electricity and transport undertakings and general purposes, deducting income tax in the usual way. The corporation claimed, under the provisions of the South Shields Corporation Act, 1935, to treat the assessed profits of the electricity and transport undertakings as part of the assessed profits out of which the interest was paid and to retain the amount of tax paid on those profits. It was held, reversing the decision of LAWRENCE, J., that by the provisions of the Act the

(1) (1952), 116 J.P. 498.

(2) 106 J.P. 216; [1942] 2 All E.R. 39; [1942] 2 K.B. 228; *affd.*, H.L., 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

(3) 94 J.P. 123; [1930] A.C. 307.

(4) [1936] 2 All E.R. 375; [1937] A.C. 77.

profits of those undertakings could lawfully be applied to the payment of the interest on the whole of the loan, and, consequently, those profits as assessed to income tax formed part of the profits brought into charge out of which the interest was paid or deemed to be paid, notwithstanding that it appeared from the accounts of those undertakings, kept separately as required by the Act, that the surplus revenues of those undertakings had been treated as applied to certain specified purposes of those undertakings.

The provisions of s. 108 to s. 112 of the Exeter Corporation Act, 1935, are very similar to those of s. 112 to s. 115 of the South Shields Corporation Act, 1935. In particular, the provisions of s. 112 (1) of the Exeter Act and those of s. 115 (2) of the South Shields Act are almost alike, except that there are certain words in the Exeter Act which are not in the South Shields Act. Section 115 (2) of the South Shields Act is:

"If in respect of any year the moneys received by the corporation on account of the revenue undertaking . . . shall exceed the aggregate of (i) the moneys paid or expended by the corporation in respect of the undertaking for the several purposes mentioned in . . . the section of this Act of which the marginal note is 'Accounts'; and (ii) any moneys applied to a fund for providing working capital then—(a) if the reserve fund in respect of the electricity undertaking does not amount to more than one-twentieth of the aggregate capital expended for the time being upon the undertaking the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the said excess; (b) if the said reserve fund amounts to more than one-twentieth of the said aggregate capital the corporation shall fix such amount as they may think fit (not being less in any case in which the said excess is more than a sum equal to  $1\frac{1}{2}$  per centum of the outstanding debt of the undertaking than the difference between that sum and the said excess) and the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate to the amount so fixed."

The words

" . . . shall be credited to the revenue account of the undertaking for the next following year . . . "

which appear in s. 112 (1) (b) of the Exeter Act, are not in s. 115 (2) (b) of the South Shields Act, and, after the words,

" . . . the charges for electricity supplied by the corporation shall be reduced by such amount or respective amounts as will as nearly as reasonably practicable be equivalent in the aggregate . . . "

which are in both Acts, para. (b) of the Exeter Act ends with the words "to the amount so deemed to be revenue", instead of "to the amount so fixed". Later, I shall consider whether or not that difference in the provisions of the two Acts is material.

The question in *Allchin v. Coulthard* (1) was whether, where a payment was made out of the general rate fund for interest, that interest could be taken as being paid out of a fund which had already borne tax, so that the local authority making the payment were entitled to retain the amount of the tax deducted after paying the interest, on the basis that they had already paid

(1) 106 J.P. 216; [1942] 2 All E.R. 39; [1942] 2 K.B. 228; *affd.*, H.L., 107 J.P. 191; [1943] 2 All E.R. 352; [1943] A.C. 607.

the tax. That question is very different from the one which is now before me, but the Exeter Corporation relied on the distinction drawn by LORD GREENE, M.R., between an amount which represents actual money and one which merely represents figures on paper. LORD GREENE, M.R., said:

"Much of the obscurity which surrounds this matter is due to a failure to distinguish the two senses in which the phrase 'payment out of a fund' may be used. The word 'fund' may mean actual cash resources of a particular kind (e.g., money in a drawer or at a bank) or it may be a mere accountancy expression used to describe a particular category which a person uses in making up his accounts. The words 'payment out of' when used in connection with the word 'fund' in its first meaning connote actual payment, e.g., by taking the money out of the drawer or drawing a cheque on the bank. When used in connection with the word 'fund' in its second meaning they connote that for the purposes of the account in which the fund finds a place, the payment is debited to that fund, an operation which, of course, has no relation to the actual method of payment or the particular cash resources out of which the payment is made. Thus, if a company makes a payment out of its reserve fund—an example of the second meaning of the word 'fund'—the actual payment is made by cheque drawn on the company's banking account, the money in which may have been derived from a number of sources. The phrase 'reserve fund' only has a meaning as indicating the item in the company's accounts to which it decides to debit the payment. It will be seen, therefore, that to speak of an actual payment being made out of a fund in the second sense is really a misuse of language. A fund in the second sense is merely an accountancy category. It has a real existence in that sense, but not in the sense that a real payment can be made out of it as distinct from being debited to it. Unless these two meanings of the phrase 'payment out of a fund' are kept distinct, much confusion of thought must ensue. A real payment cannot be made out of an imaginary fund: per LORD MACMILLAN in *Central London Railway v. Inland Revenue Commissioners* (1)."

LORD GREENE, M.R., thus reached the conclusion that there was nothing to prevent the South Shields Corporation treating payments of interest as being paid out of the profits of its undertaking, and, therefore, out of funds which had already borne tax. It may be that, in the present case, the fund which is treated in the accounts as a fund relating to the electricity undertaking of the Exeter Corporation is a fund in the second sense in which it is used by LORD GREENE, M.R., that is to say, that all the actual funds are in the general rate fund, although, for the purposes of the undertaking, certain funds are treated as falling to that undertaking, and, that, therefore, the entries in the account relating to the electricity undertaking must be regarded merely as a series of book-keeping entries for the purposes of ascertaining the financial situation of the electricity undertaking. I am prepared to accept that, but I do not think that it necessarily follows that that disposes of the plaintiffs claim, because it seems to me that, in considering what is to be taken over by the electricity authority in the present case, one has to ascertain what are to be treated as the assets of the Exeter Corporation in respect of their electricity undertaking. Therefore, it is not an answer to say that the items in the revenue account of the corporation's electricity undertaking are merely entries in accounts. It seems to me that they have to be treated, under the provisions

(1) [1936] 2 All E.R. 375; [1937] A.C. 77.



of the Exeter Corporation Act, as part of the assets of the electricity undertaking of the corporation, and, that being so, when those assets are to be taken over by the body which is created by the Electricity Act, 1947, it may well be that it is those assets, or the amount equivalent to those assets, which has to be handed over, and it is not an answer to say: "Of course, the moneys actually are not in a separate account. They are in the general rate fund of the corporation".

In the event which has happened in this case, under s. 112 (1) of the Exeter Corporation Act, 1935, one has first to ascertain on the operations for the year whether the revenue of the undertaking exceeds the expenditure mentioned under the various heads of s. 109 (1) of the Act. I agree with the contention of counsel for the corporation that the provisions of s. 112 (1) are clearly related to operations of a given year. If there is an excess of revenue over expenditure, then the provisions of para. (a) or of para. (b) of s. 112 (1) are to be applied. In this case, the provisions of para. (b) are to be applied because the reserve fund amounts to more than one-twentieth of the aggregate capital expenditure. First, the corporation have to decide what amount shall be credited to the revenue account, and they are entitled to take out  $1\frac{1}{2}$  per cent. of the outstanding debt of the undertaking and credit that to the benefit of the rates. Then para. (b) provides that that sum shall be credited to the revenue account of the undertaking for the next following year and the charges for electricity supplied by the corporation shall be reduced to correspond as nearly as possible with that sum, by which I understand that it is intended, theoretically at any rate, that the charges to be made by the corporation for the following year will be reduced so that the revenue received in respect thereof by the corporation will, in the following year, be less, if possible, by the amount which is carried over in the accounts, and the amount which is carried over in the accounts is so "deemed to be revenue". It seems to me that, if it is to be revenue, it has to be considered as revenue of the following year. Counsel for the corporation contended that it was to be treated as revenue for the year to which the account related, with the result that, at the end of the year, it went back again for the benefit of the rates. If that construction were correct, the result, on the figures, would be that the plaintiffs would, in fact, have been over-paid instead of being under-paid. It seems to me that that construction will not work. The opposite view produces, I agree, some odd results, because it means that the amount carried over will, in a sense, be carried over again, possibly, until it is extinguished, with the result that the charges will again have to be reduced, and, possibly, there may eventually be a loss which will require the charges to be increased again, whereas, according to the construction put forward by counsel for the corporation—which was attractive in many respects—once the sums were carried over to the following year, if the adjustments and charges were accurate, the surplus so carried over would, theoretically, be wiped out, there would be in hand revenue equivalent to the expenditure for the following year, and the sum carried over would be left intact. One would then have a state of equilibrium, all being well, and one would go on from year to year without having to reduce the charges unless the expense of generation, or something of that kind, was so reduced that a further excessive profit was made. I do not think, however, that that was the effect of s. 112 (1) (b), because, whatever may have been the intention of the draftsman of the provisions, it seems to me that it cannot produce that result. If the sum carried over forms part of the revenue of the following year, it is deemed to be revenue for that year by the Act. Then, it seems to me, it must

again come into consideration in ascertaining at the end of that year whether there is an excess of revenue over the outgoings, as contemplated by s. 109 (1) of the Act. If, on setting off the two sums against each other, there is again an excess of revenue over expenditure, I do not see how one can escape from the necessity of having to apply the provisions of s. 112 (1) (b) again, and one may have to reduce the charges further. I do not know whether or not that was the intention of the Act, but it seems to me to be the result. It seems to me that the Act does require, therefore, the whole of the excess of revenue over expenditure in any given year to be carried over to the following year and to be deemed to be revenue of that following year, and that the only amount that may be carried to the aid of the rates is the  $1\frac{1}{2}$  per cent. on the amount of the debt.

That being so, it seems to me that I must reach the conclusion that the £33,355 ought to have been carried over to the year ending Mar. 31, 1948, as revenue of that year, in addition to the sum of £37,099 0s. 4d. which was, in fact, carried over. In regard to the sum of £40,000, which had been set aside for war damage insurance, that sum, undoubtedly, represents revenue of the undertaking originally, and I cannot see how it could have been dealt with, when brought back again as no longer required for the contingent liability, except by bringing it back into the revenue account. It seems to me that it was brought back into the account in a way which was perfectly proper, and that it must be treated, therefore, as being part of the revenue of the year into which it is brought. I was much impressed by the point which was taken by counsel for the plaintiffs—that, if one were entitled to depart from these accounts and treat the items in them as mere book-keeping assets having no real value, it is difficult to see how the electricity authority could have been responsible for the overdraft of £54,463 12s. 8d. It seems to me that the accounts must be treated as showing the assets of the undertaking for the purposes of the transfer under the Act of 1947, because, if the sums received by the corporation in respect of its electricity undertaking are to be treated as part of the revenue paid into the general rate fund, the liabilities must be treated in the same way, otherwise, in my opinion, there would have been no justification for requiring the electricity authority to discharge the overdraft shown in the balance sheet of the undertaking. It seems to me, therefore, that the plaintiffs are justified in the claim which they make that they have suffered financial loss to the extent of £33,355.

*Judgment for the plaintiffs.*

Solicitors: *R. A. Finn* (for the plaintiffs); *Sharpe, Pritchard & Co.*, agents for *C. J. Newman*, town clerk, Exeter (for the corporation).

R.D.H.O.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(COLLINGWOOD AND KARMINSKI, JJ.)

Jan. 29, 1953

DAVIDSON v. DAVIDSON

*Justices—Husband and wife—Persistent cruelty—Sodomy with wife—Form of justices' finding—Need of corroboration of charge—Acquiescence by wife.*

On Aug. 20, 1952, the wife issued a summons against the husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging him with persistent cruelty to her. At the hearing before the justices on Sept. 16, 1952, the wife alleged that the husband had committed acts of sodomy on her, to which she had at first consented because he persuaded her that such acts were a form of normal intercourse. There was no corroboration of these allegations, which the husband denied, and he further denied an allegation in cross-examination, not spoken to by the wife, that he had sought sexual intercourse per os. The justices found that "there had been abnormal sexual practices" and that the husband had been guilty of persistent cruelty.

HELD: (i) acts amounting to unnatural sexual practices or sexual perversion were of great gravity, and where justices found charges of them proved they should state with precision and clarity the nature of the acts and not employ such a phrase as "abnormal practices".

(ii) the justices appeared to have failed to direct themselves as to the desirability, though not the necessity, of corroboration in cases of this kind, and also to have failed to consider the question of acquiescence by the wife, and, therefore, there should be a re-trial.

*Statham v. Statham* ([1929] P. 131) and *B. v. B.* ((1935) 99 J.P. 162), applied.

Per curiam: on the question of acquiescence, the assent of a wife, especially a young wife, could not be true assent if the acts were forced on her, either literally in the physical sense or by fraudulent persuasion that such conduct was one of the normal incidents of married life and thus was unobjectionable.

APPEAL by the husband against the decision of North Aylesford justices, sitting at Chatham, Kent, on Sept. 16, 1952, whereby they found him guilty of persistent cruelty to the wife.

The parties were married in 1949, the husband being then twenty-two years of age and the wife eighteen. A child was born in the late summer of 1949. The parties lived together until the summer of 1952, and on Aug. 20, 1952, the wife issued the summons in the present proceedings. At the hearing before the justices the wife gave evidence, inter alia, that the husband had committed on her a number of acts of sodomy, to which she had at first consented because he had persuaded her that such acts were a normal form of sexual intercourse, and that when she discovered that such conduct was not normal she refused to allow him to continue it. There was no corroboration of the wife's allegation. The husband denied having committed any act of sodomy, and, in cross-examination, he denied an allegation—which had not been spoken to by the wife—that on one or more than one occasion he had sought sexual intercourse per os.

The justices found that there had been "abnormal sexual practices", which had ceased some few months before the final break-up, and that the charge of persistent cruelty was proved, and the husband now appealed.

*Crispin* for the husband.

*Stranger-Jones* for the wife.

KARMINSKI, J., stated the facts and continued: The justices found, and it is a most important finding, that

"There had been abnormal sexual practices, although these had ceased some few months before the final break-up."

I emphasise the phrase "abnormal sexual practices", and I will content myself

with observing only that, if justices are finding something of this nature, they should say what precisely they have found in clear terms. Sodomy, of course, is a matrimonial as well as a criminal offence, and it is a very serious offence. If the justices were finding other sexual practices, it was, I think, desirable that they should have stated the precise nature of the offences which they found. In this case that has some special significance, because of the question put to the husband in cross-examination on sexual intercourse per os. We were invited to say by counsel for the wife that the finding of abnormal practices meant sodomy and nothing else, but I am quite unable to accept that argument. If they were finding sodomy they should have said so.

We are told that the justices had their attention drawn to *Statham v. Statham* (1), where it was pointed out that it was necessary for a jury to be directed, or a court to direct itself, on the desirability, though not the necessity, of corroboration in cases of this kind. If the justices were so warned it is, I think, a matter of great regret that they did not refer to the question of corroboration in their reasons. It is, of course, always open to any court to find a charge of this kind proved without corroboration, but it must first warn itself of the dangers of so doing. In *B. v. B.* (2), which was decided some years after *Statham v. Statham* (1), the principles to be applied in cases of sodomy and sexual perversion were fully argued by experienced counsel, and SIR BOYD MERRIMAN, P., dealt with the matter, if I may respectfully say so, in the clearest possible terms, in these words:

"The court demands that when a matrimonial offence, whatever it is, is charged, if possible the evidence of the spouse making the charge should be corroborated, and not least with regard to matters of the sort charged in this case, about which, if there was not a reasonably strict rule in this respect, one spouse would be so easily at the mercy of the other in relation to things which from their nature must happen in private. But when that has been said it is admitted that the necessity for corroboration is not an absolute rule of law. Justices should direct themselves, just as a judge should direct a jury, that it is safer to have corroboration, if possible; but when that warning has been given and given in the fullest form, then there is no rule of law which prevents the tribunal finding the matter proved in the absence of corroboration."

The matter before the justices, and before this court in *B. v. B.* (2), were allegations of perverted sexual intercourse, and that direction I must follow. I am far from satisfied that the justices, if their attention was called to *Statham v. Statham* (1), either understood that decision or directed themselves properly according to it. It is clear in this case, as so often happens in cases either of sodomy or perversion, that there can be no corroboration, but it must also be remembered that no charge can be more easily made by a wife or is more difficult for a husband to answer.

Even if the justices did direct themselves properly as to the desirability of corroboration and were right in finding sodomy after a proper direction to themselves, they do not seem to have considered at all the question, which must arise in charges of this kind, of acquiescence by the wife, and as SIR BOYD MERRIMAN, P., pointed out in *B. v. B.* (2), referring to *Statham v. Statham* (1):

"If the conduct charged against the husband is a thing which could prima facie only have happened with the assent of the wife there must

(1) [1929] P. 131.

(2) 99 J.P. 162; [1935] P. 80.



be some corroboration; and she ought not to be able to come to the court to complain of something to which she herself has consented. Whichever way it is put, it is plain that the closest scrutiny ought to be given by justices to an allegation of cruelty which at the end of it all is based upon filthy acts of this sort which cannot have occurred without at least the assent of the wife."

It is true that the assent of a wife, especially a young wife, cannot be a true assent if the acts are forced on her, either literally in the physical sense, or by some fraudulent persuasion that such conduct was only one of the normal incidents of married life and thus was unobjectionable. But that aspect of acquiescence, which, in my view, is vital in these cases, does not seem to have been considered by the justices at all. At any rate, the matter is not mentioned in their findings.

I have gone into the questions of corroboration and acquiescence in the hope that it may be of some assistance to the justices who will have to re-try this matter. These cases are inevitably difficult, whether for justices or for higher tribunals, and I have referred to *Statham v. Statham* (1) and *B. v. B.* (2) in the hope that the justices' attention may be called to the requisites to be proved and to the dangers to be avoided in cases of this kind. I have no doubt whatsoever that the trial by the justices which resulted in this order was completely unsatisfactory, and, in my view, there must be a new trial before a fresh panel of justices.

COLLINGWOOD, J.: I agree.

*Order accordingly.*

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *Wood, McLellan & Williams*, Chatham (for the husband); *T. Boyd Whyte*, Gillingham (for the wife).

G.F.L.B.

- (1) [1929] P. 131.  
(2) 99 J.P. 162; [1935] P. 80.

#### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PEARSON, JJ.)

Feb. 4, 5, 1953

#### YORKSHIRE DYEING AND PROOFING CO., LTD. v. MIDDLETON CORPORATION

*Drainage—Trade effluent—Discharge into sewer from one set of premises before 1937—Acquisition of new premises—Effluent from both premises blended on and discharged from old premises—No notice of discharge since addition of new premises—Public Health (Drainage of Trade Premises) Act, 1937 (1 and 2 Geo. 6, c. 40), s. 2 (1), s. 4 (1), s. 14 (1).*

The appellants, who were occupiers of trade premises, had, prior to 1937, and thereafter up to 1946, discharged trade effluent from those premises through two pipes into a sewer. In 1946 they acquired new premises adjoining the old premises and moved to them some of their plant and machinery. Thereafter trade effluent produced in the new premises was conveyed to the old premises, where it was blended with effluent produced on the old premises, and the mixed effluent was discharged into the sewer through the two pipes originally in use. The nature and total amount of the mixed effluent did not differ from the nature and amount of the effluent discharged in and before 1937. No notice of a proposed discharge

of effluent had been given to the local authority by the appellants since the acquisition of the new premises. Informations under s. 2 (5) (a) of the Public Health (Drainage of Trade Premises) Act, 1937, were preferred against the appellants before a court of summary jurisdiction, charging them with discharging trade effluent into a public sewer of the local authority without giving notice and without having obtained the consent of the authority. The justices convicted the appellants, and, on appeal to quarter sessions, their decision was affirmed.

HELD: that the mixed effluent was not produced at the same premises as that at which effluent had been produced within the year ending on Mar. 3, 1937; that the word "discharged" in s. 2 (1) of the Act of 1937 referred to both direct and indirect discharge into the sewer; and that, accordingly, the discharge did not come within the exemption arising from s. 4 (1), and the convictions were, therefore, right.

CASE STATED by the appeal committee of Lancashire quarter sessions.

At a court of quarter sessions sitting for the county of Lancaster on June 20, 1952, the appellants, Yorkshire Dyeing and Proofing Co., Ltd., appealed against convictions on two informations which had been laid against them by Frank Johnston, clerk of the Middleton Borough Council. The informations charged that the appellants, being occupiers of certain trade premises at Spring Vale, Middleton, on July 25, 1951, discharged into a public sewer of the council of the borough of Middleton a certain trade effluent, contrary to the Public Health (Drainage of Trade Premises) Act, 1937, s. 2, no trade effluent notice having been served and that the said effluent was discharged without the consent of the council.

It was proved or admitted that the appellants had for many years, and, in particular, during the year ending Mar. 3, 1937, occupied certain trade premises at Spring Vale, Middleton, and from those premises had discharged through two pipes into a public sewer of the council trade effluents produced on those premises. In January, 1946, the appellants occupied, in addition to their original premises, some adjoining premises which had belonged to a foundry, and to them the appellants moved some of their plant and machinery. Trade effluent was produced in the new premises and passed into the old premises where it mixed and blended with an approximately equal amount of effluent produced on the old premises and then was discharged into the public sewer through the same pipes as had been used before the acquisition of the new premises. It was also found that the amount so discharged did not exceed the maximum quantity lawfully discharged in 1937; that the rate of discharge was the same as in 1937; that the mixed effluent was of the same nature or composition as the effluent then discharged; that on July 25, 1951, no trade effluent notice had been served on the council; and that the appellants had not obtained the consent of the council to the discharge of any effluent produced on the new premises.

It was contended on behalf of the appellants that (i) the trade effluent was produced in part in the course of trade or industry carried on in the old premises, (ii) the discharge was from the old and not from the new premises, and (iii) the new premises were part of premises from which effluent of the same nature and composition had been lawfully discharged in 1937, and that, in consequence, the appellants were protected under the Public Health (Drainage of Trade Premises) Act, 1937, s. 4 (1), and had committed no offence in not serving notice on or obtaining the permission of the council so to discharge their trade effluent. On behalf of the respondents it was contended that (i) part of the discharge was from the new premises, (ii) no discharge came from those premises during 1937, (iii) the new premises were not part of premises from which trade effluent of the same nature and composition had been lawfully discharged in 1937, and that, consequently, offences had been committed under s. 2 of the

Act by reason of the appellants not serving the necessary notice on or obtaining the permission of the local authority. Quarter sessions dismissed the appellants' appeal, and the appellants appealed to the Divisional Court.

*Willis, Q.C.*, and *C. T. B. Leigh* for the appellants.

*Diplock, Q.C.*, and *Cantley* for the respondents.

**LORD GODDARD, C.J.:** This is a Case stated by the appeal committee of the quarter sessions for the county of Lancaster, before whom the appellants appealed against two convictions by justices in petty sessions. The first was:

"For that they on July 25, 1951 were the occupiers of certain trade premises situate at Spring Vale, Middleton, from which premises a certain trade effluent was discharged into a public sewer of the council of the borough of Middleton, the local authority, in contravention of s. 2 of the Public Health (Drainage of Trade Premises) Act, 1937 (hereinafter called the Act) no trade effluent notice having been served."

The second conviction is on the same facts except that the offence alleged was the discharging of the effluent without the consent of the local authority. The appeal committee dismissed the appeals subject to the Case which they have stated.

For many years before 1937 the appellants occupied a dye works at Middleton and discharged their trade effluent into the local authority's sewer. In 1946 they acquired adjoining premises which had been a foundry, and made them part of their works. That was a substantial addition to the premises. It was not within the original curtilage or in the original ownership of the firm. Having acquired the new premises, the appellants transferred part of their dye works to them, and in that new dye house a certain trade effluent is produced. Effluent continues to be produced in the old works, and the effluent from the new dye house and the old dye house merges on the old premises. Therefore, the discharge into the sewer still takes place from the old premises, but it is not only of the effluent from the old premises but also of the effluent from the new premises.

The matter depends principally on s. 4 of the Public Health (Drainage of Trade Premises) Act, 1937, and s. 14, the definition section. The Act is intended to prohibit the discharge of trade effluent into the sewers of local authorities except with the consent of the authorities, which is to be applied for by serving a notice on the authority under s. 2 (1), and under s. 2 (3) the authority can impose conditions under which the effluent can be discharged. The Act, however, by s. 4 (1), exempts from its provisions the discharge of trade effluent which was lawfully discharged at some time within the period of one year ending on Mar. 3, 1937, subject to certain conditions. Section 4 (1) provides:

"For the purposes of this Act the consent of a local authority to the discharge of any trade effluent from any trade premises into a sewer of the local authority shall not be necessary, if any trade effluent of the same nature or composition as that of the trade effluent in question was lawfully discharged as aforesaid from those premises into that sewer at some time within the period of one year ending on Mar. 3, 1937, and if and so long as—(a) the quantity of the trade effluent discharged from the premises into the sewer on any one day does not exceed the maximum quantity thereof so discharged on any one day during the said period, and (b) the rate at which the trade effluent is discharged from the premises into the sewer is not higher than the highest rate at which it was so discharged during the said period . . ."

The justices found that the composition of the effluent is the same, that the quantity does not exceed the maximum specified, and that the rate at which it is discharged is not higher than the rate at which it was discharged. It would appear as though the merits of this case were with the appellants—at any rate it is not easy to see why, as they are not discharging any more or different effluent into the sewer than they did before 1937, the local authority object—but we have to consider whether or not the case does come within the exemption. If it does not come within the exemption, the offence has been committed notwithstanding the fact that it would appear the merits are not conspicuously against the appellants. The definition section, s. 14 (1), which has given rise to a good deal of discussion, provides:

“‘Trade effluent’ means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises, but does not include domestic sewage.”

I think that the words “wholly or in part” relate to the composition or constitution of the trade effluent, and that “trade effluent” for this purpose means a fluid which is composed partly of the product of the trade or business and partly of something else which in the ordinary course would be water.

In my opinion, the whole question depends—and I take the same view as did quarter sessions—on whether or not this trade effluent which is now going into the local authority’s sewer is produced at the same premises as those at which it was produced before March, 1937. Quarter sessions took the view that it is not because it is now the effluent of two sets of premises and not the effluent of one set. They have held, and I think rightly held, that the new dye house is not a part of the old premises, but constitutes separate and new premises, and it seems to me impossible to say that the effluent which is being produced in the new dye house is not being discharged into the local authority’s sewer. It is true that it passes through the old premises and mingles there with the effluent which is produced in the old premises, but none the less it seems to me that the effluent produced is being produced in the new premises and discharged into the sewer. For these reasons, I feel bound to say that I think quarter sessions came to a right decision, and this appeal fails.

**LYNSKEY, J.:** I agree. Under the Public Health Act, 1936, s. 34 (1) (a) (i) which is referred to as the principal Act in the Public Health (Drainage of Trade Premises) Act, 1937, there was a complete prohibition against the discharge either directly or indirectly of trade effluent into public sewers, but by the Act of 1937 provision was made to enable such effluent to be discharged subject to certain notices being given and the consent of the local authority obtained and to a right of appeal to the Minister of Health. It is provided by s. 2 (5):

“If, in the case of any trade premises—(a) any trade effluent is discharged in contravention of this section, or without such consent (if any) as is necessary for the purposes of this Act, or (b) any direction or condition given or imposed under this section is contravened, the occupier of the premises shall be guilty of an offence.”

[His LORDSHIP stated the facts.] The first point that arises is whether what took place constituted a discharge of effluent from the new premises into the sewer? It has been suggested on behalf of the appellants that “discharge” must mean



direct discharge. Having regard to the wording of the Act and the results which would follow if one narrowed the meaning of the word "discharge" to direct discharge, I take the view that "discharge" here means discharge directly or indirectly into the sewer. The result of that is, on the finding of the justices, that the effluent from the new premises is discharged into this sewer. Those premises were not in use for this purpose in 1937, and in 1937 there was no discharge of effluent from those premises into the sewer. It follows that there was a discharge of effluent from the new premises into the sewer which could not be brought within the provisions of the exemption in s. 4 (1). *Prima facie*, that was clearly an offence, but it is suggested by the appellants that the effect of s. 4 (1) is to enable them to carry the effluent from the new premises through their old premises and discharge it into the sewer because the total effluent discharged from the two sets of premises does not exceed in quantity or differ in nature from the effluent which was discharged in 1937. The whole matter seems to me to turn on the interpretation of s. 4 (1) and the definition section, s. 14 (1), dealing with trade effluent. The definition there is

"any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at trade premises . . ."

That is the definition of "trade effluent", an effluent in part produced by the trade operation and in part coming from other sources. Then the definition goes on:

" . . . and, in relation to any trade premises, means any such liquid as aforesaid which is so produced in the course of any trade or industry carried on at those premises . . ."

In my view, the object of the second part of the definition was to restrict the trade effluent to the particular premises on which the trade is carried on, and it would not bear a construction which would enable the effluent from the new premises, which were not covered by s. 4 (1), to be discharged under the umbrella of the exemption which the old premises acquired under s. 4 (1) of the Act. In those circumstances, I take the view that quarter sessions were right, and this appeal should be dismissed.

**PEARSON, J.:** I agree. I think the first question is whether one should regard for the present purpose the two sets of premises as one aggregate or as two separate sets of premises. I do not think it would be right to treat them as one aggregate having regard to the previous history of the premises and what has been found by the justices here. In any case, if it were right to treat them as one aggregate, in my view, they would clearly be different premises from those which were occupied by the appellants in 1937. If it were right to treat them as one aggregate, being different premises from anything that existed in 1937, s. 4 (1), which confers the exemption, would have no application, and that would put the appellants here in the worst possible position. But be it assumed that the old and the new premises are two separate sets of premises, which is the way in which the justices have approached this question, then one has to consider two problems:—(i) Is the direct discharge of the effluent in question from the old premises into the sewer covered by the provisions of s. 4 (1)?; and (ii) Is the indirect discharge of the effluent from the new premises through the old premises also covered by s. 4 (1)?

As to the first question, I think that the second part of the definition in s. 14 (1), when one makes the necessary substitutions for the words "such liquid as aforesaid" and the word "so", comes to this: "Trade effluent"

in relation to any trade premises means any liquid, either with or without particles of matter in suspension therein, which is wholly or in part produced in the course of any trade or industry carried on at those premises." It seems to me that the word "so" must be regarded as incorporating the words "wholly or in part". One must read as a whole the words which follow

"in the course of any trade or industry carried on at those premises."

It seems to me that that requirement is satisfied as regards the old premises because the effluent which is discharged from there into the local authority's sewer is in part liquid of the kind described, produced in the course of a trade or industry carried on in the old premises, and it does not prevent the application of that definition that some part of what is discharged has been produced in other premises. It would not matter whether the premises were in the occupation of the same or a different company. I think that part of the definition read literally, which it should be unless it produces an impossible conclusion, would have that result, and, therefore, the appellants are innocent so far as that direct discharge is concerned.

There is, however, the further question whether s. 4 (1) protects the appellants in respect of the indirect discharge from the new premises. One has to consider whether the word "discharge" means direct or indirect discharge or is limited only to direct. I entirely agree that it is important to look back to s. 34 (1) (a) (i) of the Public Health Act, 1936, which imposed an absolute prohibition on the discharge of liquid from a factory into a sewer, subject to certain conditions. Section 1 (1) of the Public Health (Drainage of Trade Premises) Act, 1937, mitigates that prohibition. Section 34 (1) (a) (i) of the Act of 1936 uses the words "discharge directly or indirectly", and, as s. 1 (1) of the Act of 1937 is introducing a relaxation of that prohibition, I think the word "discharge" in that sub-section—and, therefore, throughout the Act—should have the same meaning of "directly or indirectly discharge". Also, I think that, without any limiting words, one would naturally read the word "discharge" as meaning directly or indirectly. Therefore, I think it is necessary for the appellants to show some justification for their indirect discharge from the new premises into the sewer. They have not shown it, and for this purpose they clearly do not come within s. 4 (1) since there was no discharge in or before 1937 from those premises into the sewer, and, therefore, they have failed to show any right to make that indirect discharge without the consent of the local authority, and I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Charles Russell & Co.*, agents for *Skelton & Co.*, Manchester (for the appellants); *Sharpe, Pritchard & Co.*, agents for *Frank Johnston*, town clerk, Middleton (for the respondents).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNKEY AND PEARSON, JJ.)

Feb. 5, 6, 1953

ISLE OF WIGHT COUNTY COUNCIL v. WARWICKSHIRE COUNTY COUNCIL

*Children and Young Persons—Approved school order—Local authority within whose district child resident named by juvenile court—Appeal to court of summary jurisdiction—Name of another authority substituted—Appeal to quarter sessions—No residence at that date—Local authority within whose district offence committed held liable—Children and Young Persons Act, 1933 (23 Geo. 5, c. 12), s. 70 (2), s. 90 (2), (3).*

On Sept. 7, 1951, a boy was found guilty of larceny by a juvenile court within the district of the I.O.W. County Council which ordered him, under s. 57 (1) of the Children and Young Persons Act, 1933, to be sent to an approved school. The court named in its order, for the purposes of responsibility for maintenance of the boy under s. 70 (2) of the Act, the W. County Council as being the authority within whose district the boy was resident. The W. County Council appealed under s. 90 (2) of the Act to a court of summary jurisdiction which varied the order of the juvenile court by substituting the name of the I.O.W. County Council. The I.O.W. County Council appealed to quarter sessions under s. 90 (3) of the Act. Quarter sessions found that at the date of the order the boy was not resident anywhere for the purposes of s. 70 (2) of the Act, and, holding that they had jurisdiction to vary the order of the juvenile court by substituting the name of the I.O.W. County Council, as local authority within whose district the offence was committed, as being responsible for the boy's maintenance, they dismissed the appeal.

HELD, that the appeal under s. 90 (3) was an appeal only against the order made by the court of summary jurisdiction and not an appeal against the order of the juvenile court; the power to name, for the purposes of responsibility under s. 70 (2), the local authority within whose area the offence was committed where the residence of the offender was unknown was confined to a juvenile court, and was not conferred either on a court of summary jurisdiction or a court of quarter sessions hearing an appeal; and, accordingly, quarter sessions had no power to make the substitution, and the original order of the juvenile court must stand.

Per curiam: There is a lacuna in s. 90 (2) in that it gives a local authority a right to appeal only if they desire to contend that the person to whom the order relates (i) was resident in the district of some other local authority, or (ii) was resident outside England. It confers no right of appeal where a local authority deny that the person was resident in their district and allege that the place of his residence is unknown.

CASE STATED by Isle of Wight Quarter Sessions.

The appeal committee of the County of the Isle of Wight Quarter Sessions, sitting at Newport, on June 19, 1952, dismissed an appeal by the appellants, the Isle of Wight County Council, under s. 90 (3) of the Children and Young Persons Act, 1933, against an order dated Apr. 29, 1952, made under s. 90 (2) of the said Act by a court of summary jurisdiction sitting at Ryde, whereby an approved school order, dated Sept. 7, 1951, and made by a juvenile court sitting at Ryde under s. 57 (1) (a) of the Act, was varied by substituting therein the name of the appellants in place of the respondents, the Warwickshire County Council, as the local authority within whose district a boy, Allan White, was resident.

Before the appeal committee it was proved or admitted that the boy was born on June 25, 1935, and was at all material times a "young person" within the meaning of s. 107 (1) of the Act; that at all material times the parents of the boy were separated, the father living near Rugby in the county of Warwick and the mother's last known address in August, 1948, being Butlin's

Holiday Camp, Skegness; that in August, 1948, the mother put the boy on a train at Peterborough and sent him to his grandmother who lived near Rugby; that the grandmother was unable to care for the boy, that the father could not or would not have the boy to live with him, and that the respondents took him temporarily into their care under s. 1 of the Children Act, 1948, and accommodated him in Warwickshire until July 28, 1950, the Warwickshire Education Committee accepting responsibility for his maintenance; that from July, 1950, until Sept. 5, 1950, he stayed with friends in Warwickshire; that on the latter date he joined the Royal Navy, but was discharged, "services no longer required", on Aug. 14, 1951, and provided with a railway ticket to Rugby, as the place of residence of his father as next of kin; that he used the ticket as far as London and then travelled by train to Southampton to join the merchant navy; that during his search for a recruiting office he saw a steamer bound for the Isle of Wight, and, thinking he might obtain work there, purchased a single ticket to Cowes arriving there on Aug. 15, 1951; that the boy remained on the Isle of Wight until Aug. 18, 1951, sleeping in the open and taking meals in cafés; that on Aug. 17, 1951, he took a sailing dinghy at Cowes and sailed it out to sea, but, finding the sea too rough, returned and landed at Bembridge; that at Bembridge he boarded a yacht, and on Aug. 18, 1951, cast off intending to make for France, but that on Aug. 19, 1951, the yacht was intercepted by a motor torpedo boat and the boy was brought back to England; that on Sept. 7, 1951, a juvenile court, sitting at Ryde, found the boy guilty of the larceny of the yacht and made an approved school order, naming the respondents as the local authority within whose district the boy was resident.

It was contended on behalf of the appellants (i) that for the purposes of s. 70 (2) of the Act the material date on which residence had to be determined was the date on which the approved school order was made, and that residence for the purposes of the said section meant the place at which the young person ordinarily had his home; (ii) that at the material date there was no evidence that the boy was resident in the Isle of Wight; (iii) that, the juvenile court having determined that the boy was resident at the material dates in the county of Warwick and having named the respondents in the approved school order under s. 70 (2) of the Act, the court of summary jurisdiction to whom the respondents appealed under s. 90 (2) of the Act had power to vary the said order only if they established that the boy was either resident in the district of some other local authority or was resident outside England, and that s. 90 (2) conferred no power on the court of summary jurisdiction to vary the said order by substituting for that of the respondents the name of the appellants as the local authority within whose district the boy committed the offence, his residence at the material date being unknown; (iv) that the respondents had failed to discharge the burden of proof that the boy was resident in the appellants' district, and that the decision of the court of summary jurisdiction must be reversed unless the appeal committee had jurisdiction to vary the approved school order and by an order to exercise any power which might have been made and exercised by the juvenile court; (v) that the right of appeal to quarter sessions was confined, by s. 90 (3), to such persons as were aggrieved by a decision or order of a court of summary jurisdiction under s. 90 (2); and (vi) that, in view of the limitations on the powers granted to a court of summary jurisdiction by s. 90 (2), the jurisdiction of the appeal committee of quarter sessions was confined to the making of any order which might have been made by the court of summary jurisdiction under s. 90 (2), and did not extend to



the making of any order which might have been made by the juvenile court.

It was contended on behalf of the respondents (i) that for the purposes of s. 70 (2) residence had to be determined at the date of the commission of the offence, that residence ordinarily meant the place where a person ate and slept, and that at the date of the commission of the offence the boy was resident in the Isle of Wight; alternatively, (ii) that the boy's residence at the material date was unknown and the juvenile court should have named in the approved school order the local authority within whose district the boy committed the offence, and that by virtue of s. 1 of the Summary Jurisdiction (Appeals) Act, 1933, the appeal committee had jurisdiction to make any order which the juvenile court might have made, and, consequently, had jurisdiction to vary the order in accordance with s. 70 (2) of the Children and Young Persons Act, 1933, by naming the appellants in place of the respondents as the local authority within whose district the boy committed the offence.

The appeal committee were of the opinion: (i) that for the purposes of s. 70 of the Act the material date on which residence had to be determined was the date on which the approved school order was made, on which date the boy was not resident anywhere; (ii) that the proper order to make was to vary the approved school order by substituting therein for the name of the respondents the name of the appellants as the local authority within whose district the boy committed the offence; (iii) that there was jurisdiction to make such an order because (a) if the Act could reasonably be construed in such a way as to obviate what, as was conceded, would otherwise be a lacuna in its provisions, it should be so construed; (b) when an approved school order was made by a juvenile court the local authority was frequently neither heard nor represented; (c) consequently, the right of appeal to a court of summary jurisdiction conferred on such a local authority by s. 90 (2) of the Act frequently represented the first opportunity for such a local authority to be heard at all; (d) the words "may appeal to" in s. 90 (3) should be construed as "may apply to"—the analogous procedure under the previous provisions of s. 74 of the Children Act, 1908, was therein stated to be by way of application; (e) the right of appeal conferred by s. 90 (3) of the Act on any person aggrieved by an order made under the last foregoing sub-section was a right of appeal against an approved school order made by a juvenile court although varied by a court of summary jurisdiction and not merely a right of appeal against a decision of a court of summary jurisdiction; (f) there was, therefore, jurisdiction to review the approved school order as made by the juvenile court and to employ all the powers conferred on the appeal committee by s. 31 of the Summary Jurisdiction Act, 1879, as substituted by s. 1 of the Summary Jurisdiction (Appeals) Act, 1933. The appellants appealed.

*Brodrick* for the appellants.

*Marshall, Q.C.*, and *M. G. Polson* for the respondents.

**LORD GODDARD, C.J.:** This is a Case stated by the appeal committee of the quarter sessions for the Isle of Wight, before whom an appeal was brought by the appellants against an order made by a court of summary jurisdiction under s. 90 (2) of the Children and Young Persons Act, 1933. The case raises a curious and interesting point, and I am conscious that in allowing this appeal the result may not seem to be one that operates with conspicuous justice. The conclusion to which we have come is based on the fact that there is a curious lacuna in s. 90 of the Children and Young Persons Act, 1933, to which, if our decision is not reversed by any higher court, it is desirable that the

attention of the Home Office should be called with a view to considering an amendment of the law by legislation.

On Sept. 7, 1951, a boy was brought before the justices in the Isle of Wight, sitting as a juvenile court, charged with stealing a yacht. He had gone on board a yacht which was lying in Bembridge Harbour and was endeavouring to sail it to France, but he was caught by a motor boat, was brought back, and was charged with and convicted of stealing the yacht. The justices committed him to an approved school and made an order on the respondents as the local authority responsible for his maintenance, no doubt because the information before them was that his father lived near Rugby. The respondents having been served with that order, but not having been present at the hearing before the justices, which, apparently, was not necessary, took advantage of s. 90 (2) of the Children and Young Persons Act, 1933, and appealed to a court of summary jurisdiction sitting in the Isle of Wight, contending that the boy was resident in the district of some other local authority than theirs, and that, therefore, the name of some other local authority ought to be inserted in the order instead of the Warwickshire County Council. The justices heard that appeal and substituted the appellants as the local authority. The appellants then appealed under s. 90 (3) of the Act against that order to quarter sessions, where the appeal committee upheld the order of the court of summary jurisdiction, but stated a Case for the opinion of this court.

[HIS LORDSHIP stated the facts and continued:] The appeal committee found that the boy was not resident either in Warwickshire or in the Isle of Wight, and this court cannot see that they have any power to say that because the boy was "sleeping rough" in the Isle of Wight for two nights he must be deemed to have been residing in the Isle of Wight. At any rate, he seemed to have no intention of residing there, for, if he had gone there thinking he was going to find work, he seems to have abandoned his intention very quickly because he got in the yacht and sailed away. The case seems to me, with all respect, to be wholly different from what might have been the position if the boy had gone into some employment in the Isle of Wight because then, like any other servant, he would be residing there: see *Stoke-on-Trent Borough Council v. Cheshire County Council* (1). That being the case, when this boy was brought before the justices and found guilty of larceny, the justices had to consider the provisions of s. 70. By s. 70, as amended by the Children Act, 1948, s. 60 and sched. IV, Part I, it is provided:

"(1) Every approved school order shall contain a declaration—(a) as to the age; and (b) as to the religious persuasion; of the child or young person with respect to whom it is made. (2) Every approved school order, other than an order . . . made by reason of the commission of an offence under s. 10 of this Act (which relates to the punishment of vagrants preventing children from receiving education), shall name the local authority within whose district the child or young person was resident, or if that is not known, the local authority or one of the local authorities within whose district the offence was committed or the circumstances arose (as the case may be) rendering him liable to be sent to an approved school: Provided that— . . . (b) in the case of a child or young person not resident in England, the order shall, instead of naming a local authority, state that he was resident outside England."

Therefore, when a case is before the juvenile court the justices may, and, indeed, must, inquire so far as they can where the young person is resident.

(1) 79 J.P. 452; [1915] 3 K.B. 699.

If they can find where he is resident, they insert in the order the name of the local authority for that place of residence, but, if they cannot find where he is resident, they should put in the district in which the offence was committed. The third case is where he is resident out of England, but we can leave that out of account. So that, when the boy was brought before the juvenile court, if the justices had not found he was resident in Warwickshire, they could have inserted the name of the appellants since the Isle of Wight was the place where the offence was committed, but they did not do so. They named the respondents.

By s. 90 (2) it is provided:

"A court by which an approved school order is made shall cause a copy thereof to be served forthwith on the local authority named in the order, and if that authority desire to contend that the person to whom the order relates was resident in the district of some other local authority or was resident outside England they may, by notice in writing given at any time within three months after the service upon them of the order, appeal—  
(a) if the order was made by a petty sessional court, to a court of summary jurisdiction acting for the same petty sessional division or place; and  
(b) if the order was made by a court which was not a petty sessional court, to a court of summary jurisdiction having jurisdiction in the place where that court sat, or in the place from which the person to whom the order relates was committed for trial, and if, upon the hearing of the appeal, the court is satisfied that the person to whom the order relates was resident in the district of that other local authority, or was resident outside England, the court may by order vary the approved school order by substituting therein the name of that other authority or, as the case may be, a statement that the said person was resident outside England."

It will be observed that the local authority does not have to be served until the order has been made. The curious thing about that section is that the draftsman has entirely overlooked the fact that if the place where the young person is resident cannot be ascertained, the place to be named in the order is the place where the offence was committed. Section 74 in the Children Act, 1908, did make such a provision, but in the Act of 1933 there is the curious lacuna that s. 90 (2) for some reason or another, which I can only assume to be an oversight, omitted to deal with the case of a local authority being able to say: "This boy does not reside in our district and the district to be named in the order is the district where the offence was committed". It only gives them power to go to the court and say: "He does not reside in our district, but he resides in the district of some other local authority". What is to be done in a case where a local authority satisfies the court that the boy does not reside in their district, but cannot show where he does reside? The section has not made any provision for it, but the power that is given by the section to the court on the appeal, as the statute calls it, or application, as counsel for the respondents invites us to call it, is to insert the name of another local authority where it is proved that the boy resides in the district of that local authority. It does not, as it appears to me, give any power to the court, where proceedings are taken under s. 90 (2), to insert in the approved school order the name of the local authority in whose district the offence was committed, and, unless the court can insert the name of another local authority on it being proved that the boy is resident there, which is the only power that is given to the court, it follows that the order made by the juvenile court must stand.

The result does not seem just to the respondents, but an order was made on them, they cannot show that the boy is resident in the district of any other

local authority or out of England, and there does not seem to be any power in the court to vary the order. The court of summary jurisdiction varied the order by inserting the name of the local authority, not within whose district the boy resided, but the authority within whose district the offence was committed, and it does not appear to me that the section gives them power to do that.

Counsel for the respondents invited us to say that the order should be upheld because the appeal committee ought to have held that the boy was resident in the Isle of Wight since he had slept there for two nights preceding the offence. The appeal committee state that they find as a fact that he did not reside in the Isle of Wight, and, on the evidence, we think they were amply justified in coming to that conclusion. I should have come to that conclusion on the evidence. I do not think it can be said that the boy resided anywhere. He went to the Isle of Wight, and then left it; he had no place in which to live there, and I think it would be wholly wrong to say that he was residing in the Isle of Wight. It was also said that this appeal could be treated by the appeal committee as an appeal against the order of the juvenile court. I think that is the way in which the appeal committee did regard the matter and thought they were able to do what they considered to be justice and so get over the difficulty caused by this lacuna, but I am afraid that that is really writing something into the Act which is not there. Admittedly, this appeal was brought under s. 90 (3) as an appeal against an order which was made under s. 90 (2)—the "last foregoing sub-section"—and it cannot be an appeal against the original order which was made some time before under s. 57 (1) (a). Section 90 (2) and (3) appear to me to give particular, peculiar, and special remedies to a local authority—a right of appeal to a court of summary jurisdiction under sub-s. (2) if they find they have been named in an order when they ought not to have been so named, and a right of appeal to quarter sessions under sub-s. (3) against the decision of the court of summary jurisdiction. I do not think that the local authority in such a case as this can appeal to quarter sessions under s. 102 (1) (c), as amended by the Children Act, 1948, s. 60 and sched. III, which provides for an appeal to quarter sessions and reads:

"In the case of an order requiring a person to contribute in respect of himself or any other person, by the person required to contribute."

But it is not necessary to decide the point. I think that that is an appeal which is given to a parent or guardian, or a person who stands in loco parentis, who may be ordered to contribute to the upkeep of the child. I think an appeal by a local authority is an appeal which is given by s. 90 (3) and by no other provision. For these reasons, not without considerable hesitation and some regret, I think this appeal succeeds.

**LYNSKEY, J.:** I agree for the reasons given by my Lord. I hope steps will be taken to fill the gap which appears to exist in s. 90 (2) of the Act.

**PEARSON, J.:** I agree.

*Appeal allowed.*

Solicitors: *L. H. Baines*, clerk of the county council (for the appellants); *Sharpe, Pritchard & Co.*, agents for *R. M. Willis*, Warwick (for the respondents).

T.R.F.B.



## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., CROOM-JOHNSON AND PEARSON, JJ.)

Jan. 20, 21; Feb. 6, 1953

REG. v. MISKIN LOWER JUSTICES. *Ex parte* YOUNG

*Husband and Wife—Maintenance—Arrears—Application for committal order—Suspension—Non-fulfilment of conditions of suspension—Appropriation of payments—Discharge of committal order by payment of original debt—Summary Jurisdiction (Married Women) Act, 1895 (58 and 59 Vict., c. 39), s. 9.*

On May 16, 1951, justices made an order that a husband should pay to his wife a weekly sum of £2 10s. for the maintenance of herself and a child. On July 12, 1951, the wife took out a summons in respect of arrears under the order amounting to £7 12s. 6d., and on Aug. 1 the justices made a committal order, but suspended its operation as long as the husband paid the weekly sum of £2 10s. provided for in the original order plus 2s. a week on account of the arrears. During each of next two weeks the husband paid £2 only, and on Aug. 18, 1951, the wife applied for a warrant committing him to prison. The justices issued a warrant for the balance of £3 12s. 6d. on the footing that £4 of the original debt had already been paid. While the warrant was in the hands of the police, the husband made a further payment of £2, and, on being arrested, he made a further payment of £1 12s. 6d. He was then released on the ground that he had paid the full amount of the original debt. The wife subsequently applied for an order of mandamus directing the justices to exercise the discretion conferred on them by s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 8 of the Money Payments (Justices' Procedure) Act, 1935, and, in particular, to consider committing the husband to prison for non-payment of the arrears.

HELD, (i) that the committal order was, and remained throughout, the sanction for the non-payment of the original debt, and the postponement of its issue on the condition that the husband regularly paid the amounts of the weekly payments plus some addition on account of the arrears gave the husband a beneficial option and did not deprive him of the right to secure a discharge of or release from the committal order by payment of the original debt, although he had not complied with the conditions of the suspension and further arrears had accrued; (ii) that, on the facts of the case, the husband was rightly considered to have paid the original debt of £7 12s. 6d. by making the payments of £2, £2, £2 and £1 12s. 6d., there being no evidence of any express appropriation of any of the sums paid to the current weekly payments and no grounds for implying any such appropriation. The order for mandamus, therefore, should not issue.

Per curiam: the husband, having failed to keep up the current payments, was liable to further proceedings and a new committal order in respect of the arrears.

## APPLICATION for order of mandamus.

At a court of summary jurisdiction for the petty sessional division of Miskin Lower, Glamorganshire, on May 16, 1951, the justices made a maintenance order requiring Herbert Wallington Young (the husband) to pay £2 10s. a week to the collecting officer for his wife, Gwladys Elsie Young, and child. The husband failed to make regular payments, and on Aug. 1, 1951, the justices made an order committing him to prison for one month, such order to be suspended so long as he paid the sums provided for in the maintenance order, and in addition 2s. a week on account of arrears, which amounted to £7 12s. 6d. The husband made two weekly payments of £2, and on Aug. 18, 1951, the wife applied for a warrant to commit him. While the warrant was in the hands of the police the husband made a further payment of £2, and, on being arrested, he made a further payment of £1 12s. 6d. He was then released on the footing that he had paid the full amount of the original debt. The wife obtained leave to apply for an order of mandamus requiring the justices to commit the husband to prison on the ground that, the wife having applied orally to them to implement the terms of the suspended committal order and to commit the husband to

prison, the justices had refused that application, and that their refusal was wrong.

*Pennant and H. A. P. Fisher for the wife.*

*F. E. Jones for the husband.*

*Cur. adv. vult.*

Feb. 6. **LORD GODDARD, C.J.:** PEARSON, J., will deliver the first judgment.

The following judgments were read.

**PEARSON, J.:** This case arises out of a maintenance order made by the court of summary jurisdiction for the petty sessional division of Miskin Lower, in the county of Glamorgan, and a suspended committal order made by the same court on the ground of non-payment of arrears under the maintenance order. The motion is on behalf of the wife for an order of mandamus directed to the justices and requiring them to exercise the discretion conferred on them by s. 9 of the Summary Jurisdiction (Married Women) Act, 1895, and by s. 8 of the Money Payments (Justices Procedure) Act, 1935, and, in particular, to consider committing the husband, against whom the maintenance order was made, to prison for non-payment of arrears under the maintenance order. The grounds of the application are that, the wife having applied orally to the justices to implement the terms of the suspended committal order and to commit the husband to prison, such application was refused by the justices by letter dated Nov. 23, 1952, and that their refusal so to do was wrong.

The maintenance order was made by the justices on May 16, 1951, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and the material provisions of the order were that (i) the legal custody of a child of the marriage between the parties be committed to the wife; (ii) the husband do pay to the collecting officer on behalf of the wife the weekly sum of £2, together with the additional sum of 10s. for the maintenance of the child, the first of such payments to be made on Wednesday, May 25, 1951, and the subsequent payments on every Wednesday in each succeeding week; and (iii) the husband do pay the sum of £2 12s. 6d. for the costs of the court and of the wife incurred in obtaining the order.

On July 12, 1951, the wife caused to be issued a summons in respect of arrears under the maintenance order amounting to £7 12s. 6d., and on Aug. 1, 1951, the justices made an order committing the husband to prison for one month, such order to be suspended so long as the husband paid the weekly sum of £2 10s. provided for in the maintenance order, and in addition 2s. per week on account of arrears. The sum for non-payment of which the committal order was made was the above-mentioned sum of £7 12s. 6d. In each of the next two weeks the husband paid to the collecting officer the sum of £2 only, so that the condition on which the committal order was suspended was not complied with, but a total of £4 was paid. On Aug. 18, 1951, the wife applied for a warrant to commit the husband. A warrant of commitment was issued for the balance of £3 12s. 6d. on the footing that £4 of the original debt of £7 12s. 6d. had already been paid. While the warrant was in the hands of the police the husband made a further payment of £2, and, on being arrested, he made a further payment of £1 12s. 6d., and he was then released on the footing that by that time he had paid the full amount of the original debt. From Nov. 22, 1951, to Jan. 8, 1952, there was correspondence between the wife's solicitor and the clerk to the justices. The clerk to the justices, in a letter of Jan. 4, 1952, referred to the sums of £4, £2 and £1 12s. 6d. paid by the husband, and said that the husband had paid the amount for which he

had been summoned, that the commitment could not be issued again, and that the wife should apply for a further summons for arrears, then amounting to £20 13s. 6d., with a view to the husband again being brought to the court to be dealt with. In reply to that letter the wife's solicitor wrote on Jan. 5, 1952:

"I regret that I cannot agree with your contention. The sum of £4 paid by the defendant by Aug. 18 was in respect of the current order and not the arrears. The arrears were not reduced at all, but, in fact, were increased by the sum of 10s. per week. The warrant, therefore, should have been issued for £7 12s. 6d., the full amount of the arrears, of which the defendant has now paid only the sum of £3 12s. 6d. If your contention was correct a defendant could escape the consequences of the committal entirely by merely paying the current order and could say that any sum paid was on account of arrears. It is my contention that the weekly payments made must be set off first against the current order, and it is only any balance which can be set off against the arrears."

The clerk to the justices wrote on Jan. 8, 1952:

"The legal position as to the appropriation of payments made to the collecting officer after the committal order has been made and suspended so long as certain fixed payments are made is not free from doubt. There has been a great deal of correspondence in the JUSTICE OF THE PEACE AND LOCAL GOVERNMENT REVIEW on this question during the past twelve months. Opinions have been expressed by some of the correspondents that, unless a special direction is given by the sender, a collecting officer is bound to appropriate the whole of such payment to that part of the total amount due which first accrued, namely, the arrears. In your client's case that course was followed, with the result that the total amount of arrears due in respect of the commitment was paid. I, therefore, regret that I can do nothing to assist your client, but suggest that she issue a further summons for the arrears now due under the order, which amount to £20 13s. 6d."

Two questions arise, namely, (i) whether the husband was entitled to secure a discharge of or release from the committal order by paying the original debt of £7 12s. 6d. notwithstanding that he had not complied with the conditions on which the committal order was suspended and further arrears had accrued, and (ii) whether the husband was rightly considered to have paid the original debt by making the payments of £2, £2, £2 and £1 12s. 6d. mentioned above. For the purpose of determining the first question it will be necessary to consider the relevant statutory provisions. Section 9 of the Summary Jurisdiction (Married Women) Act, 1895, provides:

"The payment of any sum of money directed to be paid by any order under this Act may be enforced in the same manner as the payment of money is enforced under an order of affiliation."

The maintenance order in this case was made under that Act as amended or extended by the Married Women (Maintenance) Act, 1920, and the Married Women (Maintenance) Act, 1949. The main provisions for enforcement of the payment of money under an order of affiliation are contained in s. 4 of the Bastardy Laws Amendment Act, 1872, and with later amendments, so far as material, are as follows:

"... and if at any time after the expiration of fourteen clear days from the making of such order as aforesaid it be made to appear to any one

justice, upon oath or affirmation, that any sum to be paid in pursuance of such order has not been paid, such justice may, by warrant under his hand and seal, cause such putative father to be brought before any two justices, and in case such putative father neglect or refuse to make payment of the sums due from him under such order, or since any commitment for disobedience to such order as hereinafter provided, together with the costs attending such warrant, apprehension, and bringing up of such putative father, such two justices may, by warrant under their hands and seals, direct the sum so appearing to be due, together with such costs, to be recovered by distress and sale of the goods and chattels of such putative father . . . but if upon the return of such warrant, or if by the admission of such putative father, it appear that no sufficient distress can be had, then any such two justices may, if they see fit, by warrant under their hands and seals, cause such putative father to be committed to the common gaol or house of correction . . . there to remain, without bail or mainprize, for any term, not exceeding three calendar months unless such sum and costs, and all reasonable charges attending the said distress, together with the costs and charges attending the commitment and conveying to gaol or to the house of correction, and of the persons employed to convey him thither, be sooner paid and satisfied."

Section 1 of the Affiliation Orders Act, 1914, provides for the appointment of collecting officers and prescribes their duties. Section 54 of the Summary Jurisdiction Act, 1879, provides, so far as material, as follows:

"This Act shall apply to the levying of sums adjudged to be paid by an order in any matter of bastardy, or by an order which is enforceable as an order of affiliation, and to the imprisonment of a defendant for non-payment of such sums, in like manner as if an order in any such matter or so enforceable were a conviction on information . . . This Act shall be construed as one with the Summary Jurisdiction Act, 1848, so far as is consistent with the tenour of such Acts respectively, and save as aforesaid shall be subject to the exceptions specified in s. 35 of the Summary Jurisdiction Act, 1848."

Section 35 of the Summary Jurisdiction Act, 1848, provides, so far as material, as follows:

" . . . nor shall anything in this Act extend or be construed to extend to any complaints, orders, or warrants in matters of bastardy made against the putative father of any bastard child, save and except such of the provisions aforesaid as relate to . . . the levying of sums ordered to be paid, or to the imprisonment of a defendant for non-payment of the same."

Section 28 of the Summary Jurisdiction Act, 1848, provides, so far as material, as follows:

" . . . and in all cases in which any person shall be imprisoned as aforesaid for non-payment of any penalty or other sum he may pay or cause to be paid to the keeper of the prison in which he shall be so imprisoned the sum in the warrant of commitment mentioned, together with the amount of the costs, charges and expenses (if any) therein also mentioned, and the said keeper shall receive the same, and shall thereupon discharge such person, if he be in his custody for no other matter."

Section 21 (1) of the Summary Jurisdiction Act, 1879, provides as follows:

"A court of summary jurisdiction to whom application is made either



to issue a warrant of distress for any sum adjudged to be paid by a conviction or order, or to issue a warrant for committing a person to prison for non-payment of a sum of money adjudged to be paid by a conviction, or in the case of a sum not a civil debt by an order, or for default of sufficient distress to satisfy any such sum, may if the court deem it expedient so to do, postpone the issue of such warrant until such time and on such conditions, if any, as to the court may seem just."

The Criminal Justice Administration Act, 1914, s. 3 (1), as amended by s. 79 of and sched. IX to the Criminal Justice Act, 1948, provides as follows:

"(1) Where a term of imprisonment is imposed by a court of summary jurisdiction in respect of the non-payment of any sum of money . . . that term shall, on payment of a part of such sum to any person authorised to receive it, be reduced by such number of days as bears to the total number of days in term less one day the proportion most nearly approximating to, without exceeding, the proportion which the part paid bears to the sum in respect of which the imprisonment is imposed. (2) Provision may be made by rules under s. 29 of the Summary Jurisdiction Act, 1879, as to the application of sums paid under this section and for determining the persons authorised to receive such payments and the conditions under which such payments may be made."

The relevant rules are the Summary Jurisdiction Rules, 1915 (S.R. & O., 1915 No. 200), rr. 18-25, as amended by S.R. & O., 1933, No. 1120. Section 32 (3) of the Criminal Justice Administration Act, 1914, provides as follows:

"Where in any proceedings for the enforcement of an order in any matter of bastardy or of an order enforceable as an order of affiliation the court commits the defendant to prison then, unless the court otherwise directs, no arrears shall accrue under the order during the time that the defendant is in prison."

Moreover, the imprisonment discharges the defendant from liability for the arrears for which he was imprisoned: HALSBURY'S LAWS OF ENGLAND, Hailsam ed., vol. 21, p. 650, note (o); LUSHINGTON'S LAW OF AFFILIATION AND BASTARDY, 6th ed., p. 70, note (h); *Robson v. Spearman* (1). Section 5 of the Summary Jurisdiction Act, 1879, provides a scale of maximum terms of imprisonment for non-payment of money, the maximum terms being proportioned to the amounts unpaid.

In my opinion, it appears from these provisions that (subject to possible additions in respect of costs, which do not in principle affect the present question) (i) the committal order is the sanction for the non-payment of what may conveniently be called "the original debt", being the specific sum which is mentioned in the application for the committal order and proved to the justices to be in arrear; (ii) if there were a distress warrant, it would be for the levying of the amount of the original debt; (iii) a committal order cannot be made if the original debt has already been paid by the time when the application for the committal order is made to the justices; (iv) even after the defendant has been committed to prison, he can secure his release by payment of the original debt, and he can secure a proportionate reduction of the term of imprisonment by payment of part of the original debt; (v) the maximum term of imprisonment depends on the amount of the sum for non-payment of which it is imposed; and (vi) where a committal order is "suspended" on conditions, as in this

(1) (1820), 3 B. & Ald. 493.

case, there is only a postponement of the issue of the committal order so long as certain conditions are complied with, and there is no enlargement of the scope of the committal order.

In my opinion, the committal order remains throughout the sanction for non-payment of the original debt, and the postponement of the issue of the committal order on condition that the husband regularly pays the amounts of the weekly payments plus some addition on account of the arrears which constitutes the original debt merely gives to the husband a beneficial option and does not deprive him of the right to secure a discharge of or release from the committal order by payment of the original debt. The option is beneficial to the husband, because, if he exercises the option, no further arrears accrue and he gradually pays off the original debt for which the committal order is the sanction, so that the committal order remains suspended and eventually is discharged or ceases to have effect. If he does not exercise the option and fails to keep up the current payments, he is liable to further proceedings and a new committal order in respect of the new arrears, but the existing committal order retains its original character as the sanction for the original debt and is not converted into a sanction for the growing total of the original debt plus the accumulating new arrears. If the existing committal order, which is for a short term of imprisonment related to the small amount of the original debt, were converted into the sanction for the growing total, he could "work off" by imprisonment for a short term a large amount of old and new arrears for which a longer term of imprisonment would be appropriate. In my opinion, the answer to the first question is that the husband was entitled to secure a discharge of or release from the committal order by paying the original debt of £7 12s. 6d. notwithstanding that he had not complied with the conditions on which the committal order was suspended and further arrears had accrued.

The second question is whether the husband was rightly considered to have paid the original debt of £7 12s. 6d. by making the payments of £2, £2, £2 and £1 12s. 6d. mentioned above. The answer to that question must depend on the facts of the particular case. In this case the husband did make those payments and they did amount to £7 12s. 6d. He would be likely to wish these payments to be utilised in discharge of the original debt so that he would secure his release from the committal order. He was obviously not exercising his option to comply with the conditions of suspension, because he was not paying £2 12s. per week regularly or at all. Nor was he paying regularly or at all the amounts of the current weekly payments due under the maintenance order at the rate of £2 10s. per week. There was no evidence of any express appropriation of any of the sums paid to the current weekly payments, and there are no grounds for implying any such appropriation. So far as appears from the evidence, the first two sums paid were not appropriated, except that by payment to the collecting officer they were appropriated generally to the indebtedness of the husband to his wife under the orders of the court. The third payment probably was, and the last payment, made to avoid arrest, certainly was, appropriated to discharging the balance of the original debt. In those circumstances, I am of opinion that the husband was entitled to appropriate or have appropriated all these sums to the discharge of the original debt and he was rightly considered to have paid the original debt. Accordingly, in my opinion, this application fails and should be dismissed.

**CROOM-JOHNSON, J.** (read by **PEARSON, J.**): I agree that the husband was entitled to secure a discharge from his liability to be committed

to prison by paying the amount of the arrears, £7 12s. 6d., outstanding at the time that the committal order was made. I agree that the justices were empowered by s. 21 of the Summary Jurisdiction Act, 1879, if they thought it expedient so to do, to postpone the issue of the warrant on such conditions, if any, as to them might seem just, but I can find no power in them in so doing to deprive the husband of his right to pay off the arrears and so avoid committal and preserve his liberty, and they did not purport to do so. The question whether the husband was rightly considered to have paid the arrears of £7 12s. 6d. is, in my opinion, a question of fact. The husband was not bound to take advantage of the terms on which the justices suspended the committal order and he was obviously not doing so. I agree with PEARSON, J., whose judgment I have had the advantage of reading in advance, that there was no evidence of any express appropriation by the husband of any of the sums paid to the weekly amounts continuing to accrue under the maintenance order, and I know of no right in the collecting officer to make any such appropriation. On the figures, the last payment of £1 12s. 6d. must have been intended by the husband to discharge the balance of the £7 12s. 6d.; it can refer to nothing else and is not, I think, a mere arithmetical coincidence. On the facts of this case, I have come to the conclusion that the husband was rightly considered to have paid off all the arrears of £7 12s. 6d., and I agree that the application for mandamus should be dismissed.

**LORD GODDARD, C.J.:** I agree with the judgment of PEARSON, J., and, in view of the importance of this matter, I will shortly state my opinion. At first sight it would seem that, if justices suspend the operation of a committal order on certain terms with which the person affected thereby does not comply, the order ought to take effect and a warrant should issue, but a person can only be committed for arrears, and those must be arrears which had accrued when application for committal is made. If, then, he is ordered to pay off arrears at so much a week and to keep up the payments under the original maintenance order and he pays a sum which wipes out the arrears, if he were then sent to prison it would follow that he was being committed for arrears accruing since the date of the order. I think, therefore, that the justices were right in refusing to issue a warrant, but could have made a fresh order in respect of the arrears which had accrued since the date of the committal order, and this they offered to do. In my opinion, the matter does not depend on the law relating to appropriation of payments, but solely on the statutory provisions relating to the power to commit and to the husband's right to avoid committal by paying off the arrears. This latter right cannot be taken away. If the justices had powers similar to those conferred by r. 6 of the recent Matrimonial Causes (Judgment Summons) Rules, 1952 (S.I., 1952, No. 2209) the present difficulty and seeming anomaly would not arise, but these rules cannot be applied to orders of courts of summary jurisdiction without legislation.

The proceedings in this case took the form of an application for mandamus, but I have no doubt the matter could be raised by way of Special Case, and I think it would be most desirable if all appeals relating to matters under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, were brought to the Probate, Divorce and Admiralty Division. In *Ruther v. Ruther* (1) it was held that a Special Case arising out of an application to commit for arrears lay to this Division and not to the Probate, Divorce and Admiralty Division, but, if I may say so, the reasons given do not appear to be wholly satisfactory, and evidently the Divisional Court of the Probate, Divorce and

(1) 67 J.P. 359; [1903] 2 K.B. 270.

Admiralty Division which heard *Adams v. Adams* (1) did not regard the decision with favour. If the practice could be changed by rule or by an order of the Lord Chancellor under s. 57 of the Supreme Court of Judicature (Consolidation) Act, 1925, it would, I think, be a desirable alteration. I agree that this application fails and should be dismissed.

*Application dismissed.*

Solicitors: *Rhys Roberts & Co.*, agents for *Graeme I. Kemp*, Cardiff (for the wife); *Theodore Goddard & Co.*, agents for *Morgan, Bruce & Nicholas*, Pontypridd (for the husband).

T.R.F.B.

(1) [1914] P. 155.

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### COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., LYNKEY AND PEARSON, JJ.)

Feb. 9, 1953

REG. v. SANDERSON

*Criminal Law—Procedure—Witness for defence called after summing-up.*

A witness whom the defence intended to call had not arrived in court at the conclusion of the case for the defence and did not arrive till the summing-up was nearly completed. On the conclusion of the summing-up defending counsel obtained leave to call the witness, and after the witness had given evidence, the judge delivered a short supplementary summing-up relating to his evidence.

HELD, that, in the particular circumstances of the case, the procedure followed was not open to objection.

*Reg. v. Owen* (1952) (116 J.P. 244); distinguished.

APPLICATION for leave to appeal against conviction and sentence.

The applicant was convicted at the Central Criminal Court before the Recorder of London of wounding with intent to do grievous bodily harm and was sentenced to three years' imprisonment.

No counsel appeared.

PEARSON, J., delivered the following judgment of the court. The application is refused, but there is a peculiar feature in that a witness, Mr. Hall, whom it was desired to call as a witness for the defence, did not arrive until a very late stage when the summing-up had been almost completed. After the summing-up, an application was made by the defence that he should be called even at that late stage, and that application was granted. The witness was called and the learned recorder delivered what may be called a short supplementary summing-up to the members of the jury with reference to his evidence. In *Reg. v. Owen* (1) it was held that it was wrong for witnesses to be called by the prosecution after the summing-up, but this case is distinguishable because the leave and liberty in question was extended to the defence. It is not a matter one would wish to happen very often, but, on the particular facts of this case, we think that there is no objection to be taken to what was done here and that the learned recorder was fully justified in the rather unusual course he took.

*Application refused.*

T.R.F.B.

(1) 116 J.P. 244; [1952] 1 All E.R. 1040; [1952] 2 Q.B. 362.



COURT OF APPEAL

(JENKINS AND MORRIS, L.J.J., AND ROXBURGH, J.)

Jan. 14, Feb. 10, 1953

Re A DEBTOR (No. 48 OF 1952).

*Ex parte* AMPTHILL RURAL DISTRICT COUNCIL v. THE DEBTOR

*Bankruptcy—Bankruptcy notice—Arrears of water rates—Order of court of summary jurisdiction—Direction to levy distress in default of payment—“Final order”—Bankruptcy Act, 1914 (4 and 5 Geo. 5, c. 59), s. 1 (1) (g), Summary Jurisdiction Act, 1879 (42 and 43 Vict., c. 49), s. 6, s. 35.*

A local authority, as statutory water undertakers, obtained in a court of summary jurisdiction an order against the debtor for payment of a water rate amounting to £2 12s. 6d. with 3s. costs. The order contained a direction that, in default of payment, the sum due thereunder should be levied by distress and the sale of the debtor's goods. The debtor failed to pay, and the council served on him a bankruptcy notice in respect of that order. On appeal by the debtor the bankruptcy notice was set aside by a Divisional Court of the Chancery Division on the ground that the words in the order relating to the levy of distress were a limitation and precluded the issue of a bankruptcy notice. The council appealed.

**HELD:** the fact that in the order it was provided that in default of payment the sum due might be levied by distress and sale of the debtor's goods did not diminish the effectiveness of the order which was and remained a final order against the debtor and one on which execution had not been stayed, within the meaning of the Bankruptcy Act, 1914, s. 1 (1) (g), and, therefore, the bankruptcy notice could issue.

APPEAL by Ampthill Rural District Council from an order of the Divisional Court of the Chancery Division, dated Nov. 10, 1952, allowing an appeal by the debtor from an order of the registrar of Brentford County Court, dated Sept. 10, 1952, whereby he dismissed an application by the debtor to set aside a bankruptcy notice served on him by the council.

The debtor had failed to pay to the council a sum due to them under an order of a court of summary jurisdiction. The concluding words of the order directed that, in default of payment, the sum due thereunder should be levied by distress and sale of the debtor's goods. The Divisional Court held that these words precluded the issue of a bankruptcy notice.

*J. Davidson* for the rural district council.

The debtor in person.

*Cur. adv. vult.*

Feb. 10. **MORRIS, L.J.**, read the following judgment of the court. On Apr. 26, 1951, the rating authority for the Ampthill rural district obtained an order against the debtor in a court of summary jurisdiction at Ampthill for the payment of £2 12s. 6d. and also for the payment of the sum of 3s. costs. The sum of £2 12s. 6d. represented a water rate which the rural district council, as statutory water undertakers, claimed against the debtor in respect of a house, which he owned, called “Woodfield” at Aspley Guise. The Water Act, 1945, s. 38 (3), provides:

“The water rate payable by any person may after a demand therefor be recovered from him by the undertakers either summarily as a civil debt, or as a simple contract debt in any court of competent jurisdiction . . .”

The order of the court at Ampthill was drawn up in the following words:

“It is adjudged that the defendant pay the plaintiff the sum of £2 12s. 6d. for debt and the sum of 3s. for costs to be paid forthwith

and in default of payment that the sum due thereunder be levied by distress and sale of the defendant's goods."

On Aug. 22, 1952, a bankruptcy notice, dated Aug. 21, 1952, was served on the debtor at the instance of the council in respect of the sum of £2 15s. 6d. The bankruptcy notice was in the prescribed form and was issued by the Brentford County Court. The debtor filed an affidavit stating that he applied to set aside the bankruptcy notice on the ground that he had a counterclaim, set-off or cross-demand which equalled or exceeded the amount claimed by the council and which he could not have set up in the action or other proceedings in which the judgment or order was obtained against him. He did not set out any particulars of his counterclaim, set-off or cross-demand. The registrar heard the application on Sept. 10, 1952, when the debtor appeared in person. The registrar decided that no counterclaim or set-off had been established and dismissed with costs the application to set aside the bankruptcy notice. The debtor was granted leave to appeal against the order of the registrar and an extension of time for entering his appeal. He filed his notice of appeal on Oct. 18, 1952, and in it he set out his grounds of appeal, as follows: (i) that the hearing of the case at Ampthill petty sessions was invalid; (ii) that, even if the said hearing at Ampthill were valid, the debtor had the right to set off, as a contra against the £2 15s. 6d. demanded, money previously paid under protest on rates on another house belonging to him and called "Eton Lodge", Woburn Sands East (because of a caretaker), which had not been the subject of any hearing at Ampthill or elsewhere; (iii) that certain information given by the council was misleading; and (iv) that certain expenses claimed by the council were needlessly incurred.

When the matter came before the Divisional Court, where the debtor again appeared in person, the court experienced difficulty in finding out the nature of the counterclaim and expressed no concluded view either for or against its validity. The court raised, however, a point not advanced or suggested by the debtor himself, to the effect that the words contained in the judgment or order of the court at Ampthill, i.e., the words

"... and in default of payment that the sum due thereunder be levied by distress and sale of the defendant's goods",

were words which imposed a limitation and precluded the issue of a bankruptcy notice. Feeling it incumbent on them to take notice of the point so raised and holding it to be effective, the court allowed the appeal and discharged the bankruptcy notice. By leave, appeal is now brought to this court against the order made by the Divisional Court.

Certain other facts were before us and may be briefly mentioned, though, in our judgment, they have no direct bearing on the questions to be determined. On the same day (Apr. 26, 1951) as the order for payment of the £2 15s. 6d. was made, the court of summary jurisdiction at Ampthill issued warrants of distress in respect of certain general and special rates levied on the debtor. The warrants were for sums totalling £64 14s. 8d., which represented general and special rates, partly on "Woodfield" and partly on "Eton Lodge". For such rates no recovery by action was possible, though for the amount of them there could be a petition in bankruptcy and proof in bankruptcy: see *Re McGreavy. Ex p. McGreavey v. Benfleet Urban District Council* (1). To the warrants for distress so issued there was a return of nulla bona. Before such return was made, the debtor had appealed to quarter sessions against the issue of the distress warrants, but quarter sessions held that, as the appeal

(1) 114 J.P. 185; [1950] 1 All E.R. 442; [1950] Ch. 269.

to them was before levy, it was premature: see *Reg. v. London JJ.* (1). The £64 14s. 8d. did not include the £2 12s. 6d. or any water rate. [Dealing with the question whether the debtor had established the principal point which he had intended to raise before the Divisional Court, i.e., the question whether he had a counterclaim, set-off or cross-demand which equalled or exceeded the amount of £2 12s. 6d. claimed by the rural district council and which he could not have set up in the proceedings in the Ampthill court, His LORDSHIP reviewed the evidence, and continued:] Whatever may be the precise facts, it is sufficient to say that the debtor did not "satisfy" us, any more than he satisfied the learned registrar, that he had a counterclaim, set-off or cross-demand.

We pass, therefore, to consider the aspect of the matter which was raised by the Divisional Court and guided them to their conclusion. The Bankruptcy Act, 1914, s. 1 (1), provides:

"A debtor commits an act of bankruptcy in each of the following cases . . . (g) If a creditor has obtained a final judgment or final order against him for any amount, and, execution thereon not having been stayed, has served on him . . . a bankruptcy notice under this Act, and he does not . . . either comply with the requirements of the notice or satisfy the court that he has a counterclaim set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained: For the purposes of this paragraph and of s. 2 of this Act, any person who is, for the time being, entitled to enforce a final judgment or final order, shall be deemed to be a creditor who has obtained a final judgment or final order."

In our view, there was "a final judgment or final order" against the debtor. Furthermore, execution was not stayed. It becomes necessary, therefore, to consider the meaning and effect of the final words in the judgment or order of the court at Ampthill, i.e., the words

" . . . and in default of payment that the sum due thereunder be levied by distress and sale of the defendant's goods."

It is said that the presence of those words results in a limitation, with the consequence that, as distress is expressly mentioned, the issue of a bankruptcy notice is precluded.

The Summary Jurisdiction Act, 1879, s. 35, is in the following terms:

"Any sum declared by this Act, or by any future Act, to be a civil debt, which is recoverable summarily, or in respect of the recovery of which jurisdiction is given by such Act to a court of summary jurisdiction, shall be deemed to be a sum for payment of which a court of summary jurisdiction has authority by law to make an order on complaint in pursuance of the Summary Jurisdiction Acts: Provided as follows: (1) A warrant shall not be issued for apprehending any person for failing to appear to answer any such complaint; and (2) An order made by a court of summary jurisdiction for the payment of any such civil debt as aforesaid or of any instalment thereof, or for the payment of any costs in the matter of any such complaint, whether ordered to be paid by the complainant or defendant, shall not, in default of distress or otherwise, be enforced by imprisonment, unless it be proved to the satisfaction of such court or of any other court of summary jurisdiction for the same county borough or place,

that the person making default in payment of such civil debt instalment or costs either has, or has had since the date of the order, the means to pay the sum in respect of which he has made default, and has refused or neglected, or refuses or neglects, to pay the same, and in any such case the court shall have the same power of imprisonment as a county court would for the time being have under the Debtors Act, 1869, for default of payment if such debt had been recovered in that court, but shall not have any greater power. Proof of the means of the person making default may be given in such manner as the court to whom application is made for the commitment to prison think just, and for the purposes of such proof the person making default and any witnesses may be summoned and examined on oath according to the rules for the time being in force under this Act in relation to the summoning and examination of witnesses, or if no such rules are in force, to the rules for the like purpose made in pursuance of the Employers and Workmen Act, 1875."

It seems plain from a reading of the section that, in the present case, the wording of the order would not preclude its enforcement by imprisonment on proof of means to pay as prescribed in the section. If after the making of the order there was a failure to pay, as was the case here, there might have been an application for a warrant of distress on the debtor's goods. Inasmuch as warrants of distress issued on Apr. 26, 1951, for £64 14s. 8d. met with a return of *nulla bona*, there would have been no point in making application for a warrant of distress for £2 15s. 6d., but there is nothing to exclude the applicability of that part of s. 35 (2) which may apply "in default of distress or otherwise". In conjunction with s. 35, reference should also be made to s. 6 of the Summary Jurisdiction Act, 1879, which provides:

"Where under any Act, whether past or future, a sum of money claimed to be due is recoverable on complaint to a court of summary jurisdiction, and not on information, such sum shall be deemed to be a civil debt, and if recovered before a court of summary jurisdiction shall be recovered in the manner in which a sum declared by this Act to be a civil debt recoverable summarily is recoverable under this Act, and not otherwise; and the payment of any costs ordered to be paid by the complainant or defendant in the case of any such complaint shall be enforced in like manner as such civil debt, and not otherwise."

The issue of distress warrants is provided for by the Summary Jurisdiction Act, 1848, s. 19, which is in the following terms:

"... Where a conviction adjudges a pecuniary penalty or compensation to be paid, or where an order requires the payment of a sum of money, and by the statute authorising such conviction or order such penalty, compensation, or sum of money is to be levied upon the goods and chattels of the defendant by distress and sale thereof, and also in cases where by the statute in that behalf no mode of raising or levying such penalty, compensation, or sum of money, or of enforcing the payment of the same, is stated or provided, it shall be lawful for the justice or justices making such conviction or order, or for any justice of the peace for the same county, riding, division, liberty, city, borough, or place, to issue his or their warrant of distress for the purpose of levying the same, which said warrant of distress shall be in writing under the hand and seal of the justice making the same; and if after delivery of such warrant of distress to the constable or constables to whom the same shall have been directed to be executed sufficient distress shall not be found within the limits of the jurisdiction of the justice



granting such warrant, then, upon proof alone being made on oath of the handwriting of the justice granting such warrant before any justice of any other county or place, such justice of such other county or place shall thereupon make an indorsement on such warrant, signed with his hand, authorising the execution of such warrant within the limits of his jurisdiction; by virtue of which said warrant and indorsement the penalty or sum aforesaid, and costs, or so much thereof as may not have been before levied or paid, shall and may be levied by the person bringing such warrant, or by the person or persons to whom such warrant was originally directed, or by any constable or other peace officer of such last-mentioned county or place, by distress and sale of the goods and chattels of the defendant in such other county or place . . ."

A consideration of these sections leads us to the view that the amount set out in the bankruptcy notice was properly recovered as a civil debt recoverable summarily. The fact that, in the order as drawn up, it is provided that, in default of payment, the sum due may be levied by distress and sale of the debtor's goods does not diminish the validity and effectiveness of the order. The order is and remains a final order against the debtor—and one within the words "execution thereon not having been stayed", in s. 1 (1) (g) of the Bankruptcy Act, 1914. If the concluding words in the order had not been expressly inserted, the power of the court to issue a distress warrant would not have been affected. Whether they inserted those words or not, the court of summary jurisdiction had no power or authority to make an order that no bankruptcy notice should be issued in respect of the sum adjudged to be due. That which they could not have done by express order cannot be regarded as having been done by implication. In our judgment, there was nothing which precluded the issue of a bankruptcy notice. The debtor did not substantiate any contentions denoted under (i) or (iii) or (iv) of his notice of appeal, dated Oct. 18, 1952. Accordingly, for the reasons which we have indicated, we consider that the registrar came to the correct conclusion and that this appeal should be allowed and his order restored.

*Appeal allowed.*

Solicitors: *Crossman, Block & Co.*, agents for *Sharman & Trethewy*, Ampthill (for the rural district council).

F.G.

## QUEEN'S BENCH DIVISION

(PARKER, J.)

Feb. 10, 1953

SWALLOW AND PEARSON (a firm) v. MIDDLESEX COUNTY COUNCIL

*Town and Country Planning—Enforcement notice—Invalid notice—Application by occupier for continuance of user, and appeal to Minister of Town and Country Planning—Estoppel from denying invalidity—Town and Country Planning Act, 1947 (10 and 11 Geo. 6, c. 51), s. 16 (1), s. 23 (1).*

The defendants, the local planning authority, served on the plaintiffs, building contractors, who used some land at the rear of their premises for light industrial purposes, an enforcement notice under s. 23 (1) and s. 75 (1) of the Town and Country Planning Act, 1947, to discontinue the use of the premises for industrial purposes within thirty days of service of the notice. The notice was invalid because it failed to lay down the period after which it was to take effect (see *Burgess v. Jarvis* (1952) (116 J.P. 161), and *Mead v. Plumtree* (1952) (116 J.P. 589)), but the defendants contended that the plaintiffs were estopped from denying the defendants' right to proceed on the notice and from impugning its validity since, after having been served with it, they had applied for planning permission under s. 23 (3) (a) of the Act, and had thereby elected to treat it as a valid notice.

HELD: the plaintiffs were not estopped from denying the validity of the notice.

POINTS OF LAW set down for decision under R.S.C., Ord. 25, r. 2, in an action for (i) a declaration that the plaintiffs be entitled to use certain land for light industrial purposes notwithstanding the service of a document purporting to be an enforcement notice under s. 23 (1) and s. 75 (1) of the Town and Country Planning Act, 1947; (ii) a declaration that the document be held to be wholly ineffective; (iii) an injunction restraining the defendants from prohibiting or interfering with the plaintiffs' user of the land.

The plaintiffs, who were building contractors, were proprietors of land at the rear of their premises at Wood Green, Middlesex, which they had used for light industrial purposes since they acquired the property in 1946. On May 17, 1949, the defendants, the local town planning authority, served an enforcement notice on the plaintiffs under s. 23 (1) and s. 75 (1) of the Town and Country Planning Act, 1947, to discontinue the use of the premises for industrial purposes within thirty days of service of the notice, on the grounds that the plaintiffs had been using the property concerned in contravention of previous planning control. The notice was accompanied by a document entitled: "Notes on ss. 23 and 24 of the Town and Country Planning Act, 1947". On May 19 the plaintiffs applied, under s. 23 (3) (a) of the Act, to the defendants for permission to continue to use the land. Permission was refused, and the plaintiffs appealed under s. 16 (1) of the Act to the Minister of Town and Country Planning (now the Minister of Housing and Local Government) who dismissed the appeal. The plaintiffs issued a writ claiming, inter alia, a declaration that they were entitled to use the land at the rear of their premises for light industrial purposes, notwithstanding the service of the document purporting to be an enforcement notice, and a declaration that the document was not an enforcement notice and was wholly ineffective. The defendants pleaded that the plaintiffs were estopped from denying the defendants' right to proceed on the notice, from impugning its validity, and from alleging that their use of the property was otherwise than unlawful. On Nov. 10, 1952, the master ordered that the following points of law be set down for hearing and disposed of before the trial of the issues of fact in the action: (i) Was the

notice a valid enforcement notice? (ii) If it was not, were the plaintiffs estopped from disputing its validity?

*N. N. McKinnon and J. D. James* for the plaintiffs.

*Squibb* for the defendants.

**PARKER, J.:** These proceedings are brought by the plaintiffs claiming, among other things, a declaration that they are entitled to use their premises for light industrial purposes and for a declaration that a document purporting to be an enforcement notice served on them on May 17, 1949, by the local town planning authority under the Town and Country Planning Act, 1947, s. 23 (1) and s. 75 (1), is invalid. Pursuant to an order made by a master on Nov. 10, 1952, two points of law are referred to me for decision. The first is whether that document of May 17, 1949, is a valid enforcement notice, and the second is, if it is not, whether the plaintiffs in these proceedings are estopped from disputing its validity.

The document in question, in the light of the recent decisions of *Burgess v. Jarvis* (1) and *Mead v. Plumtree* (2), is clearly invalid. Those two decisions make it quite clear that s. 23 of the Town and Country Planning Act, 1947, on its true construction, requires two periods to be set out in the notice—one a period, pursuant to s. 23 (2), for the doing of the work or the discontinuance of the use or the restoration of the land, or whatever the matter required to be done consists of, and the other a period under sub-s. (3), which is the period after the expiration of which the notice itself is to take effect. This document, which is in a form, I think, probably used by numbers of local authorities before the decision in *Burgess v. Jarvis* (1), is clearly invalid as failing to lay down the period after which the enforcement notice is to take effect. Counsel for the defendants has argued that in this particular case that defect is overcome by certain notes which are attached to the notice and to which on the face of the notice attention is drawn in these words:

“Your attention is particularly drawn to the notes accompanying this notice as to the rights of the person upon whom a notice is served.”

It is true that those notes, which set out and to some extent paraphrase sections of the Act, do draw the attention of the addressee of the document to his rights in regard to appeals and such matters, but nowhere do they say within what period those rights accrue to him. Incidentally, it is to be observed in passing that even the notes themselves are not accurate because on the facts of this case s. 75 (5) applies in the place of s. 23 (4) (a). Accordingly, I answer the first question by holding that the enforcement notice is invalid.

As regards the second point, whether the plaintiffs are estopped from disputing its validity, counsel for the defendants, on whom the burden rests, draws attention to the fact that only two days later, on May 19, 1949, the plaintiffs, as they were entitled to do under s. 23 (3) (a) of the Act, applied to the local planning authority for permission to continue the use, and on July 13, 1949, that application was refused. Not content with that, they then appealed to the Minister, under s. 16 (1) of the Act, from the decision of the local planning authority, and, finally, on Mar. 8, 1950, that appeal was refused. It is pointed out by counsel for the defendants, and it is, undoubtedly, true, that those applications and appeals were on the basis that this document of May 17, 1949, was a valid enforcement notice. He, accordingly, argues that, having treated that document as a good notice, the plaintiffs are estopped from

(1) 116 J.P. 161; [1952] 1 All E.R. 592.

(2) 116 J.P. 589; [1952] 2 All E.R. 723.

denying its invalidity. He further points out that, so far as the pleadings are concerned, the plaintiffs did not take the point affirmatively that the notice was a bad notice until the amendment of the pleadings on Apr. 25, 1952, whereas under s. 75 (1), proviso, the time for serving an enforcement notice in such a case as this expired three years after the appointed day, namely, on July 1, 1951. In that connection counsel for the defendants referred me to *W. Davis (Spitalfields), Ltd. v. Huntley* (1), where it was held that a tenant, having applied for a new lease under the Landlord and Tenant Act, 1927, s. 5 (1), on the basis of his existing lease having been determined, could not thereafter as against the landlord set up that a notice given to him by the landlord was invalid and had not terminated the lease. I am not quite clear how far that kind of principle applies when one is considering something which is prescribed by Act of Parliament. There is no doubt that a man is entitled to waive or to agree to waive the advantage of a law or rule made solely for his benefit and protection. It is equally clear that no person can waive a provision or a requirement of the law which is not solely for his benefit, but is for the public benefit. In my view, however, when this case is examined it appears that the plaintiffs have not waived some provision inserted solely for their benefit. It is said that they are estopped from denying that a particular document is valid. This enforcement notice is one which Parliament has said must be in a particular form, and when it is in that particular form its non-observance is a criminal offence not only on the part of the person on whom it is served, but, in some cases, on others. I do not think any amount of so-called waiver or approbation can make a document such as this, which is patently and wholly invalid, into a valid document with the consequences that would follow. In those circumstances I hold that the plaintiffs are not estopped.

*Order accordingly.*

Solicitors: *Craigien, Hicks & Co.* (for the plaintiffs); *C. W. Radcliffe* (for the defendants).

G.A.K.

(1) [1947] 1 All E.R. 246; *on appeal*, [1947] 2 All E.R. 371 n.



QUEEN'S BENCH DIVISION

(PARKER, J.)

Feb. 11, 12, 1953

BULLARD v. CROYDON HOSPITAL GROUP MANAGEMENT  
COMMITTEE AND ANOTHER

*Hospital—Negligence—Liability of hospital group management committee—  
National Health Service Act, 1946 (9 and 10 Geo. 6, c. 81), s. 72.*

The father of an infant, who had died of peritonitis following an operation in a hospital, brought an action, as administrator of her estate, claiming damages on the ground that her death was due to the negligence of the hospital group management committee and the surgical registrar of the hospital. The committee contended that an action did not lie against them by reason of the National Health Service Act, 1946, s. 72, which provides that a hospital management committee shall be included among the authorities referred to in s. 265 of the Public Health Act, 1875, which provides: "No matter or thing done . . . by any [specified authority], and no matter or thing done by any member of any such authority or by any officer of such authority or other person whomsoever acting under the direction of such authority, shall, if the matter or thing were done . . . bona fide for the purpose of executing . . . [the National Health Service Act, 1946], subject them or any of them personally to any action liability claim or demand whatsoever . . ."

HELD: the management committee were not absolved from liability under s. 72 and s. 265 of the respective Acts.

POINT OF LAW set down for decision under R.S.C., Ord. 25, r. 2, in an action for damages for negligence.

On Jan. 25, 1952, an infant was taken by ambulance to the Mayday Hospital, Croydon, and on Jan. 30 she died of peritonitis, following an operation for appendicitis. Her father brought an action, as administrator of her estate, for the benefit of her estate against the Croydon Hospital Group Management Committee and the surgical registrar of the hospital, whom he alleged had been responsible for her treatment while she was in hospital. The committee, in their defence, claimed the protection of s. 72 of the National Health Service Act, 1946. By an order dated Jan. 22, 1953, the master ordered that this plea be heard and disposed of before the trial of the issues of fact in the action.

*Buckee* for the plaintiff.

*M. R. Hoare* for the first defendants, the management committee.

The second defendant (the surgical registrar) did not appear.

**PARKER, J.**, stated the facts and continued: Section 72 of the National Health Service Act, 1946, provides as follows:

"Section 265 of the Public Health Act, 1875 (which relates to the protection of members and officers of certain authorities) shall have effect as if there were included among the authorities therein referred to a regional hospital board, the board of governors of a teaching hospital, a hospital management committee, a local health authority and an executive council, and as if any reference in that section to the Public Health Act, 1875, included a reference to this Act."

Section 265 of the Public Health Act, 1875, provides:

"No matter or thing done, and no contract entered into by any local authority or joint board or port sanitary authority, and no matter or thing done by any member of any such authority or by any officer of such authority, or other person whomsoever acting under the direction of such

authority, shall, if the matter or thing were done or the contract were entered into bona fide for the purpose of executing this Act, subject them or any of them personally to any action liability claim or demand whatsoever; and any expense incurred by any such authority member officer or other person acting as last aforesaid shall be borne and repaid out of the fund or rate applicable by such authority to the general purposes of this Act . . ."

There follows a proviso enabling that amount to be surcharged. It is, accordingly, argued on behalf of the first defendants that, omitting irrelevant words, this provision, as applied to them, reads as follows:

"No matter or thing done . . . by any . . . hospital management committee . . . shall, if the matter or thing were done . . . bona fide for the purpose of executing . . . the National Health Service Act, 1946, subject them . . . personally to any action."

It is said that those words are plain and say clearly that this committee cannot be sued. In that connection it is pointed out that "person" is defined in s. 4 of the Act of 1875 as including "any body of persons, whether corporate or unincorporate".

This is a novel point. Heretofore it has been a common practice—and has been understood to be the right practice—in such cases to sue the hospital management committee rather than the Minister of Health, on whose behalf, I suppose, the management committee act. I should say at the outset that, if the contention raised by the first defendants is right, it produces an extremely odd result having regard to s. 13 of the National Health Service Act, 1946, because, by sub-s. (1) of that section, it is provided that a hospital management committee shall,

"notwithstanding that they may be exercising functions on behalf of the regional hospital board, be entitled to enforce any rights acquired, and shall be liable in respect of any liabilities incurred (including liabilities in tort), in the exercise of those functions . . ."

It would be very curious if the effect of s. 72 was, in effect, to say that, notwithstanding what s. 13 (1) had provided in plain words, the management committee could not be sued. It is only right to say, however, that on the argument of counsel for the first defendants those two sections are not wholly irreconcilable, because s. 265 of the Public Health Act only applies to cases where the authority has acted bona fide in the execution of the Act, and, accordingly, there would still be room for s. 13 (1) to operate in, what, no doubt, is the exceptional case, of a management board acting mala fide.

Section 265 of the Act of 1875 was preceded by s. 264 which clearly provided that it was possible to sue a local authority. By s. 264, which was repealed and replaced by the Public Authorities Protection Act, 1893, s. 1 (a), it was provided that a writ or process should not be issued and served on any local authority, or any member, for anything done, or intended to be done, or omitted to be done, under the provisions of the Act until notice had been given, and that any action would have to be commenced within six months of notice of the cause of action. It is also relevant to point out that in s. 308 provision is made for compensation to be paid to persons who are injured or damaged by, in effect, the exercise by the local authority of its statutory powers.

I get some help by considering the Public Health Act, 1848, which the Public Health Act, 1875, repealed and replaced. The equivalent sections of that Act were: s. 139, which dealt with the notice before action and the limitation of

the action; s. 140, which was in very similar words to s. 265; and s. 144, dealing with compensation and equivalent to s. 308. Under the Act of 1848 there were a number, albeit not a large number, of decisions. Counsel for the plaintiff has referred me, among others, to *Arthy v. Coleman* (1), which was an action tried by WILLES, J., in Essex. There, a contractor employed by a board of health had been negligent in digging a hole and leaving it unlighted. He was clearly acting under the direction of the Board of Health and he sought to rely on s. 140 of the Act of 1848. WILLES, J., directed the jury in these terms:

"Upon this point the learned judge told the jury that in order to avail himself of this defence the defendant must satisfy them that he had executed the work bona fide under his employment, and not with recklessness or carelessness."

There was then a motion to the Court of Queen's Bench for a new trial, and LORD CAMPBELL, C.J., dealt first with the questions of negligence and contributory negligence and went on:

"The next question then is, against whom the action should be brought? The defendant was employed by the board of health to do a particular act, viz., to dig a hole for a well. The defendant might have done that with his own hands, but he employed two servants to do it. They dug the hole in the highway. What they did he did; what they omitted to do, he omitted to do. They allowed the hole to remain during the night without a light to warn people of the danger. That was negligence in them, and it was also negligence in him, and unless some statute absolved him, he is liable for the consequences. It is said that the Health of Towns Act\* absolved him. It would be very strange indeed if there was such an enactment, viz., that persons guilty of negligence, whereby their fellow-subjects suffered grievous injury, shall be indemnified, and that others who are in no way culpable, and know nothing of the act, and on whom no obligation to guard against it rested, shall be liable, and shall be called upon to compensate the injured party. There is no such enactment in the Health of Towns Act, and no authority for any such position in the cases cited. The maxim respondeat superior does not absolve the inferior, if by his negligence a loss has been sustained. Where there is no negligence in the party who acts in obedience to the instructions of the board of health, he is not liable; but if in doing the act he is guilty of negligence, whereby loss and damage are occasioned to another, he is personally liable. The case of *Newton v. Ellis* (2) is no authority for the argument that the party who is guilty of the negligence shall not be answerable. That case only decided that the party liable was entitled to notice of action."

*Arthy v. Coleman* (1) is authority, at least, for this, that a person is not absolved under s. 140 of the Act of 1848—and if a person is not absolved, presumably the authority itself is not absolved—merely because he has acted bona fide. If one accepts the direction of WILLES, J., which was approved in the Court of Queen's Bench, the act must be done, not only bona fide, but "done without recklessness or carelessness". In a later case, in 1858, *Southampton & Itchin Floating Bridge Co. v. Local Board of Health of Southampton* (3), the plaintiffs (the company) sought to hold the local board of health for

\* This was another name for the Public Health Act, 1848.

(1) (1857), 21 J.P. Jo. 771; 30 L.T.O.S. 101.

(2) (1855), 19 J.P. 805; 5 E. & B. 115.

(3) (1858), 22 J.P. Jo. 68; 8 E. & B. 801.

Southampton liable in negligence in the construction and maintenance of a sewer, and a number of points were taken on behalf of the local board of health including the point that the action did not lie by reason of s. 140 of the Act of 1848. It is to be observed that in the argument for the local board the first point taken was that they were wrongly sued and that they ought to have been sued by their clerk, and then the second point was taken in this way:

"Secondly, though the defendants be sued by a sufficient description, yet no such action as this is lies against a local board of health at all. The ground of complaint alleged in the declaration must be either that an act has been done which is wholly beyond the statute, or that an act has been done under the statute. If it be an act wholly beyond the statute, as an injury done by the defendants or ordered to be done *mala fide*, those persons who did it or ordered it to be done should have been sued individually. If it be within the statute, that is, an act *bona fide* intended to be properly done under the powers of the statute, but so improperly done as wrongfully to injure the plaintiffs, the only legal remedy of the plaintiffs is to obtain full compensation under s. 144 . . . For, if such an injury be done as is last described, it is expressly declared by s. 140 that no action shall be maintainable against the local board or any individual of it, for any act done *bona fide* for the purpose of executing the Act."

Then CROMPTON, J., read the terms of s. 140 and said:

"Does that protect the local board from being liable to be sued as a board for negligence, though committed in the doing of some *bona fide* act? Does it say more than that no member of the board shall in such case be personally liable?"

Pausing there, it is to be observed that there is adumbrated an interpretation of s. 265 of the Act of 1875, which is, in effect, that what s. 265 is doing is to exclude the personal liability of any members. Later, WIGHTMAN, J., interposed with reference to s. 144 (the compensation section) and said:

"Does s. 144 apply to the case of an act which, though it be done under the statute, is negligently done; or does it apply only to acts rightfully and rightly done under the statute, but to the injury of certain individuals?"

For the plaintiffs it was argued that s. 140 only exempted members of the board from personal liability. When one comes to the judgment, LORD CAMPBELL, C.J., did not expressly deal with s. 140 at all. He said that the liability of the board must depend on the statute creating it, and continued:

"Looking to the statute in question, it seems to me that the local board of health thereby created is therein considered to be liable for a wrong such as is charged in this declaration",

and that is negligence. Then he goes on:

"I am clearly of opinion that such a wrong is not within the compensation clause, s. 144."

WIGHTMAN, J., said:

"It is said, on behalf of the defendants, that no such action lies in such case against the board, but should be brought, if against any one, against the individuals who ordered that particular work. The decision depends upon the construction of the statute. Assume work injurious to an individual to be done by an agent of the board by order of the board, and the jury to find that the work was ordered and done *bona fide* in execution of the



the action; s. 140, which was in very similar words to s. 265; and s. 144, dealing with compensation and equivalent to s. 308. Under the Act of 1848 there were a number, albeit not a large number, of decisions. Counsel for the plaintiff has referred me, among others, to *Arthy v. Coleman* (1), which was an action tried by WILLES, J., in Essex. There, a contractor employed by a board of health had been negligent in digging a hole and leaving it unlighted. He was clearly acting under the direction of the Board of Health and he sought to rely on s. 140 of the Act of 1848. WILLES, J., directed the jury in these terms:

"Upon this point the learned judge told the jury that in order to avail himself of this defence the defendant must satisfy them that he had executed the work bona fide under his employment, and not with recklessness or carelessness."

There was then a motion to the Court of Queen's Bench for a new trial, and LORD CAMPBELL, C.J., dealt first with the questions of negligence and contributory negligence and went on:

"The next question then is, against whom the action should be brought? The defendant was employed by the board of health to do a particular act, viz., to dig a hole for a well. The defendant might have done that with his own hands, but he employed two servants to do it. They dug the hole in the highway. What they did he did; what they omitted to do, he omitted to do. They allowed the hole to remain during the night without a light to warn people of the danger. That was negligence in them, and it was also negligence in him, and unless some statute absolved him, he is liable for the consequences. It is said that the Health of Towns Act\* absolved him. It would be very strange indeed if there was such an enactment, viz., that persons guilty of negligence, whereby their fellow-subjects suffered grievous injury, shall be indemnified, and that others who are in no way culpable, and know nothing of the act, and on whom no obligation to guard against it rested, shall be liable, and shall be called upon to compensate the injured party. There is no such enactment in the Health of Towns Act, and no authority for any such position in the cases cited. The maxim respondeat superior does not absolve the inferior, if by his negligence a loss has been sustained. Where there is no negligence in the party who acts in obedience to the instructions of the board of health, he is not liable; but if in doing the act he is guilty of negligence, whereby loss and damage are occasioned to another, he is personally liable. The case of *Newton v. Ellis* (2) is no authority for the argument that the party who is guilty of the negligence shall not be answerable. That case only decided that the party liable was entitled to notice of action."

*Arthy v. Coleman* (1) is authority, at least, for this, that a person is not absolved under s. 140 of the Act of 1848—and if a person is not absolved, presumably the authority itself is not absolved—merely because he has acted bona fide. If one accepts the direction of WILLES, J., which was approved in the Court of Queen's Bench, the act must be done, not only bona fide, but "done without recklessness or carelessness". In a later case, in 1858, *Southampton & Itchin Floating Bridge Co. v. Local Board of Health of Southampton* (3), the plaintiffs (the company) sought to hold the local board of health for

\* This was another name for the Public Health Act, 1848.

(1) (1857), 21 J.P. Jo. 771; 30 L.T.O.S. 101.

(2) (1855), 19 J.P. 805; 5 E. & B. 115.

(3) (1858), 22 J.P. Jo. 68; 8 E. & B. 801.

Southampton liable in negligence in the construction and maintenance of a sewer, and a number of points were taken on behalf of the local board of health including the point that the action did not lie by reason of s. 140 of the Act of 1848. It is to be observed that in the argument for the local board the first point taken was that they were wrongly sued and that they ought to have been sued by their clerk, and then the second point was taken in this way:

"Secondly, though the defendants be sued by a sufficient description, yet no such action as this is lies against a local board of health at all. The ground of complaint alleged in the declaration must be either that an act has been done which is wholly beyond the statute, or that an act has been done under the statute. If it be an act wholly beyond the statute, as an injury done by the defendants or ordered to be done *mala fide*, those persons who did it or ordered it to be done should have been sued individually. If it be within the statute, that is, an act *bona fide* intended to be properly done under the powers of the statute, but so improperly done as wrongfully to injure the plaintiffs, the only legal remedy of the plaintiffs is to obtain full compensation under s. 144 . . . For, if such an injury be done as is last described, it is expressly declared by s. 140 that no action shall be maintainable against the local board or any individual of it, for any act done *bona fide* for the purpose of executing the Act."

Then CROMPTON, J., read the terms of s. 140 and said:

"Does that protect the local board from being liable to be sued as a board for negligence, though committed in the doing of some *bona fide* act? Does it say more than that no member of the board shall in such case be personally liable?"

Pausing there, it is to be observed that there is adumbrated an interpretation of s. 265 of the Act of 1875, which is, in effect, that what s. 265 is doing is to exclude the personal liability of any members. Later, WIGHTMAN, J., interposed with reference to s. 144 (the compensation section) and said:

"Does s. 144 apply to the case of an act which, though it be done under the statute, is negligently done; or does it apply only to acts rightfully and rightly done under the statute, but to the injury of certain individuals?"

For the plaintiffs it was argued that s. 140 only exempted members of the board from personal liability. When one comes to the judgment, LORD CAMPBELL, C.J., did not expressly deal with s. 140 at all. He said that the liability of the board must depend on the statute creating it, and continued:

"Looking to the statute in question, it seems to me that the local board of health thereby created is therein considered to be liable for a wrong such as is charged in this declaration",

and that is negligence. Then he goes on:

"I am clearly of opinion that such a wrong is not within the compensation clause, s. 144."

WIGHTMAN, J., said:

"It is said, on behalf of the defendants, that no such action lies in such case against the board, but should be brought, if against any one, against the individuals who ordered that particular work. The decision depends upon the construction of the statute. Assume work injurious to an individual to be done by an agent of the board by order of the board, and the jury to find that the work was ordered and done *bona fide* in execution of the

Act, then by s. 140 the agent is not to be personally liable, nor are the members of the board to be individually liable; and, if an action be brought either against the agent or any member of the board individually, his expenses are to be paid out of the rates: then the ratepayers are ultimately liable. It does not seem to be a greater hardship on them to say that an action may be brought against the board, and that the damages may be paid out of the general rate."

At the end of his judgment, he said:

"These enactments seem to assume that an action for a wrong may be brought against a local board of health, and that the local board of health may plead to such action. Then this declaration is *prima facie* sufficient, and must be answered by plea. It is unnecessary to decide now what fund, if any, is liable to pay the damages."

"These enactments" included, amongst others, s. 139 of the Act of 1848. CROMPTON, J., said:

"Looking at the whole of the statute, it seems to me that it contemplates that actions of this nature may be maintained against a local board of health."

It is true that that decision is, to some extent, inconsistent with *Arthy v. Coleman* (1) (which, incidentally, was not referred to, although LORD CAMPBELL, C.J., had sat in the court in *Arthy v. Coleman* (1)) because the judgment in the *Southampton* case (2) does not proceed on the basis that you must read, after the words "bona fide", "and without negligence", but they are reading s. 140 of the Act of 1848 as if it were a section absolving members of local authorities from personal liability. At any rate, whatever the true construction of s. 265 of the Act of 1875, both those cases to which I have referred are authority for saying that the persons referred to (including the local authority itself)—and here the hospital management committee—can be sued in negligence.

I do not know that it is for me to endeavour to interpret s. 265 of the Act of 1875, but it does seem to me that the true view may well be that one must read "and without negligence" after "bona fide", that s. 265 must be linked up with the compensation section (s. 308), and that the effect of those two sections is that where an act is done in pursuance of statutory powers and is done bona fide—and, I would add, without negligence—then no person whose property may be injured or damaged can bring a suit, but he must depend on the compensation to be awarded under the provisions of s. 308. It is sufficient for me in this case to say that I am not satisfied that s. 72 of the National Health Service Act, 1946, incorporating, as it does, s. 265 of the Act of 1875, absolves the defendants from liability.

I should say that I have been referred to a case in the Court of Session, *Davis's Tutor v. Glasgow Victoria Hospitals* (3). It is a decision which, of course, is not binding on me, but it deserves the greatest respect. It is to be observed there that LORD STRACHAN was driven to the conclusion, very reluctantly, on the statutes relating to Scotland, that the board of management of the hospital there concerned, despite the equivalent in Scotland to s. 13 of the National Health Service Act, 1946, could not be sued. I have looked at that case with some care, and I think it is sufficient for me to say that the wording of s. 166 of the Public Health (Scotland) Act, 1897 (which was the statute incorporated there), was somewhat different, but, quite apart from that, I feel unable to follow the decision in

(1) (1857), 21 J.P. Jo. 771; 30 L.T.O.S. 101.

(2) (1855), 19 J.P. 805; 5 E. & B. 115.

(3) 1950 S.C. 382.

that case. Finally, I should mention that s. 72 of the National Health Service, Act, 1946, in incorporating s. 265 of the Public Health Act, 1875, recites in brackets these words: "which relates to the protection of members and officers of certain authorities", and counsel for the first defendants, quite rightly, contends that a recital in an Act of Parliament is not conclusive. I only mention that because it is, perhaps, significant that the equivalent legislation in Scotland—the National Health Service (Scotland) Act, 1947, s. 70—in incorporating s. 166 of the Public Health (Scotland) Act, 1897, recites the latter Act in these terms: "which relates to the protection of local authorities and their officers", clearly a very significant change of words. I do not, however, think that any argument can be based on that. For these reasons I decide this issue in favour of the plaintiff.

*Order accordingly.*

Solicitors: *Frank Simmonds, Parker & Hammond*, agents for *Percy Holt & Nowers*, Croydon (for the plaintiff); *Cunliffe & Airy*, agents for *Peard & Son*, Croydon (for the first defendants); *Hempsons* (for the second defendant).

G.A.K.

## PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., and COLLINGWOOD, J.)

Feb. 13, 1953

### KLUCINSKI v. KLUCINSKI

*Husband and Wife—Maintenance—Amount—Earning capacity of husband—Overtime pay.*

On a summons taken out by a wife against her husband under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, the husband admitted that he had been guilty of adultery and desertion and evidence was given that his average weekly earnings were between £11 8s. and £12 16s. The justices found that his basic wage, excluding overtime pay, was between £9 and £10, and on that basis awarded the wife the sum of £1 10s. a week for her maintenance.

HELD: in assessing the amount of maintenance justices ought to take into account, not merely the husband's basic wage, but also his earning capacity, and to eliminate from their calculations overtime pay or the capacity to earn it was a misdirection in law.

APPEAL by the wife against an order of Mansfield borough justices made on Oct. 22, 1952, whereby they awarded her the sum of £1 10s. per week for her maintenance. The wife appealed, *inter alia*, on the ground of the inadequacy of the award, and this report deals only with that point.

*A. B. Hollis* (*Syms* with him) for the wife.

The husband did not appear.

LORD MERRIMAN, P., stated the facts and continued: The question is whether the £1 10s. for the wife is sufficient. A statement of the wages resulting from the husband's employment in a colliery in the East Midlands Division of the National Coal Board was put in evidence, which shows that, after scaling down the gross wage to the net—that is, by deducting income tax and the National Health contribution—his wages during the period from July to October, 1952, were between £11 8s. and £12 16s. On the face of it, I am bound to say it does not strike me that for an injured wife, a woman who



has been treated as this woman has been treated, £1 10s. is a very lavish award. The justices explain their award by saying that those figures include considerable earnings in respect of overtime, and that the husband's basic wage is between £9 and £10 a week. That may or may not be so, but I will assume that it is right.

In my opinion, the justices have gone wrong on a matter of principle, and we must make that clear. They say:

"Experience in dealing with such cases has shown us that, if we base the amount of our order on such figures, the man more often than not stops working overtime, as he feels he has no longer any incentive to do so."

That is a plain misdirection in law. It is elementary law that, in assessing the amount of maintenance, justices ought to take into account, just as we are bound to do here, not merely the husband's basic wage, but his earning capacity. Therefore, to make a deduction from wages actually earned because a part of those wages represents overtime, on the ground that if that part is taken into account the husband will cease to work overtime, is, in effect, to say: "We will not take any account, not merely of his earning capacity, but of the fact that he has chosen to exercise his capacity to earn". That must be wrong, and on that account I think it is clearly open to us to interfere with this order. The only question is: What is the best way to do it? [His LORDSHIP said that it would not be satisfactory to send the case back for a re-hearing of the facts as at Oct. 22, 1952, and that at present there was not sufficient evidence for the court to decide the proper amount to be awarded, and continued:] The obvious solution is to leave the wife, if it proves that she has not sufficient to live on under the order, to apply to the justices for a revision, in which event I hope that they will take note of the view I am expressing, namely, that it is wrong to eliminate from their calculations overtime pay or the capacity to earn it.

**COLLINGWOOD, J.:** I agree.

Solicitors: *Peacock & Goddard*, agents for *Rothera, Sons & Langham*, Nottingham (for the wife).

G.F.L.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE and GERRARD, JJ.)

Feb. 23, 1953

REG. v. CAMPBELL. *Ex parte* HOY*Summary Jurisdiction—Plea of Guilty—Sentence passed—Subsequent application to withdraw plea—No jurisdiction to allow change of plea.*

The respondent was charged with an offence under s. 186 of the Customs Consolidation Act, 1876, and elected to be dealt with summarily. After the charge had been explained to her, she pleaded Guilty. The magistrate, on being informed of the facts of the case, sentenced her to four months' imprisonment, but later on the same day granted an application made by a solicitor acting for the respondent that the respondent's plea be amended to a plea of Not Guilty, and directed that the case be heard by another magistrate.

**HELD:** that the magistrate, having determined the case by passing sentence, was *functus officio* and had no power to permit the change of plea, and that an order of prohibition must issue prohibiting her from further proceeding in the case otherwise than by signing a warrant of commitment.

*Rex v. Sheridan* (1936) (100 J.P. 319); *Rex v. Manchester Justices. Ex p. Lever* (1937) (101 J.P. 407) applied.

APPLICATION for order of prohibition.

On Dec. 18, 1952, Rose Lilian Lawford ("the respondent") was charged before Miss Sybil Campbell, metropolitan magistrate at the Tower Bridge Magistrate's Court, on an information preferred by the applicant, Sydney Harold Hoy, an investigation officer of Customs and Excise, with knowingly harbouring 262 pairs of American nylon stockings with intent to defraud Her Majesty of the duties thereon, contrary to s. 186 of the Customs Consolidation Act, 1876. The respondent elected to be tried summarily, and, on the charge being read to her, she said that she understood it and pleaded Guilty. The solicitor appearing for the prosecution then outlined the facts of the case, the respondent made a statement in mitigation, and the magistrate passed a sentence of four months' imprisonment. Later on the same day a solicitor acting for the respondent applied to the magistrate for the respondent to be allowed to change her plea and for a plea of Not Guilty to be entered. The magistrate granted this application and remanded the respondent on bail until Jan. 7, 1953, and directed that the case should be tried by another magistrate. On Jan. 7, 1953, the applicant appeared and submitted that the case had been heard and determined and that there was no jurisdiction to re-hear it. The magistrate before whom the case then was adjourned it till Jan. 30 in order that the submission might be repeated to Miss Campbell. On Jan. 30 the submission was repeated to Miss Campbell and she was requested to sign a committal warrant, which she declined to do.

Miss Campbell stated in an affidavit that the grounds of her decision were that the solicitor who made the application was well known to her, and she had every reason to trust him. She concluded that it was doubtful whether the respondent had fully understood the charge made against her, notwithstanding an explanation given to her by the deputy chief clerk. In considering the matter, she had taken into consideration the fact that, if she had refused the application, quarter sessions would refuse to hear an appeal against conviction, the respondent having pleaded Guilty. She would be reluctant, unless directed by the court to do so, to sign a committal warrant in respect of the respondent about whose guilt she was not entirely satisfied. The applicant thereupon obtained

leave to apply for an order of prohibition prohibiting Miss Campbell from proceeding further in the matter otherwise than by issuing a committal warrant.

*J. P. Ashworth* for the applicant.

*J. C. Mathew* for the respondent.

**LORD GODDARD, C.J.**, stated the facts and continued: It would, perhaps, have been more satisfactory if the magistrate had asked the solicitor why his client desired to withdraw her plea, but, in any case, the court is of opinion that, once the learned magistrate had convicted the respondent she was *functus officio* and had no power to allow the plea to be changed.

This was an offence in respect of which the respondent had the right to go for trial by jury, or to be tried, if she and the prosecution consented, by the magistrate sitting as a court of summary jurisdiction. It is elementary that the magistrate's duties are entirely different in the one case from what they are in the other. If a prisoner elects to go for trial, or the offence is one which must go for trial, or is one in which, until some of it has been heard, the magistrate cannot make up his mind whether he will give the option of going for trial, he sits as an examining justice to take depositions and decide whether there is a *prima facie* case, but, once jurisdiction is assumed to sit as a court of summary jurisdiction to hear and determine the case, the learned magistrate is sitting in exactly the same way as does a judge with a jury.

The respondent having pleaded Guilty, the magistrate proceeded to determine the case by passing sentence. A court of summary jurisdiction is not a court of record where there is a requirement that a minute is to be kept of decisions, but, the case having been heard and determined by the magistrate, there was a conviction, and, there being a conviction, the respondent could never be put on trial again for the same offence. The magistrate, having heard the application by the solicitor, had the respondent brought back, admitted her to bail, and directed that the case should be heard before another magistrate. There is no question, it seems to the court, since *Rex v. Manchester JJ. Ex p. Lever* (1), that, if the respondent had been brought before another magistrate, that magistrate could have been prevented from hearing the case by her saying: "I have already been convicted and sentenced". The fact that the magistrate announces in court that there is a conviction amounts to a conviction. That was laid down in this court in *Rex v. Sheridan* (2), where as prisoner, having been given the option and having elected to be tried by the justices, the justices completed the case and announced that they had convicted. Thereupon, the prisoner's record was placed before the justices; they thought it was a case in which their powers of punishment were not adequate and so they purported to recall the conviction and to commit the prisoner for trial. When the case got to quarter sessions the prisoner's counsel pleaded *autrefois* convict, and it was held that there was no answer to that plea. He had been convicted by a court of competent jurisdiction, namely, the justices who, under the Criminal Justice Act, 1925, s. 24 (1), had power to try the case. The fact that the bench announced that they convicted the prisoner amounted to a conviction. As **HUMPHREYS, J.**, said in *Rex v. Manchester JJ. Ex p. Lever* (1):

"I find it difficult to treat seriously the argument that a statement by magistrates who are a court of competent jurisdiction that a person who has been tried before them is guilty, followed by a statement that he is to pay certain penalties, does not form a conviction, and that there is no

(1) 101 J.P. 407, 410; [1937] 3 All E.R. 4, 7; [1937] 2 K.B. 96, 101.

(2) 100 J.P. 319; [1936] 2 All E.R. 883; [1937] 1 K.B. 223.

conviction unless and until some clerk has made a record of that finding and sentence in a book which the court is required to keep."

If the magistrate announces a conviction, there is a conviction.

It seems to me that, if we give effect to the argument which has been addressed to us by counsel for the respondent and uphold what the magistrate did, many curious circumstances might result. Supposing this matter had come before another magistrate and the solicitor had said to the respondent: "I think we are in difficulties here because Mr. So-and-so, the magistrate, is known to take very serious views in customs cases and his sentences are generally six months. You only got four months before Miss Campbell. You may get six months if somebody else is sitting." Could the solicitor then have made the plea of *autrefois* convict? If he had done so, I do not see what the answer would have been. Supposing that point had not been taken, but the magistrate had passed a sentence of six months instead of four months, would there have been a remedy for the respondent? I think the court would say that the second conviction was a nullity because she had already been convicted. In *Reg. v. Miles* (1) CHARLES, J., referred to

"... the well-established rule at common law that where a person has been convicted for an offence by a court of competent jurisdiction, the conviction is a bar to all further criminal proceedings for the same offence. This rule has been acted on again and again . . ."

In this case, therefore, if the magistrate convicted the respondent on her own confession and passed sentence, the respondent could never be brought before any other court charged with that offence. I think, therefore, that the magistrate, in purporting to remand the respondent on bail so that she might be brought before another magistrate, exceeded her jurisdiction, and that, having pronounced sentence, it was her duty to make out a warrant of commitment. I have a certain sympathy with the view that the learned magistrate took, but we have to apply well-settled principles of law and not make law to fit the hardship of any particular case. So far as the conviction is concerned, it seems to me that the only remedy available to the respondent, if she has any real defence, is to apply for the prerogative of mercy to be exercised.

Having given the fullest consideration to this case, I think that *Rex v. Manchester JJ. Ex p. Lever* (2) is binding on this court. It was a different case in some respects, but the ratio decidendi is obviously applicable here, and we cannot depart from it. *Rex v. Manchester JJ. Ex p. Lever* (2) and *Rex v. Sheridan* (3) prevent us from interfering in this case, and, therefore, the order of prohibition must go.

BYRNE, J.: I have every sympathy with the view taken by the magistrate, but I agree with my Lord that *Rex v. Sheridan* (3) and *Rex v. Manchester JJ. Ex p. Lever* (2) are conclusive and completely cover the matter which has been argued before this court.

GERRARD, J.: I agree.

*Order of prohibition.*

Solicitors: *M. G. Whittome* (for the applicant); *Hawker & Wheatley* (for the respondent).  
T.R.F.B.

(1) (1890), 54 J.P. 549, 552; 24 Q.B.D. 423, 438.

(2) 101 J.P. 407, 410; [1937] 3 All E.R. 4, 7; [1937] 2 K.B. 96, 101.

(3) 100 J.P. 319; [1936] 2 All E.R. 883; [1937] 1 K.B. 223.



COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., BYRNE AND GERRARD, JJ.)

Feb. 23, 1953

REG. v. MOORE

*Criminal Law—Trial—Venue—Case remitted from one court to another—No indorsement of indictment—Duty of court to which case remitted—Practice desirable to be followed—Criminal Justice Act, 1925 (15 and 16 Geo. 5, c. 86), s. 14 (2), (3)—Assizes and Quarter Sessions (Convenient Court) Order, 1926 (S.R. & O., 1926, No. 774), art. 1 (d).*

By art. 1 (d) of the Assizes and Quarter Sessions (Convenient Court) Order, 1926 (made under s. 14 (3) of the Criminal Justice Act, 1925), "any . . . indictments . . . may be altered so far as may be necessary for the purpose of giving effect to the said s. 14 . . ."

Where a case is remitted from one court to another for trial or re-trial under s. 14 (2) of the Act of 1925 and there is no indorsement on the indictment that the case has been ordered to be tried or re-tried at the court to which it has been remitted, that court is not entitled to refuse to try the case on that ground, as there is no provision either in the Act or in the order compelling the remitting court to alter the statement in the indictment of the place of trial. It is, however, a convenient practice that the remitting court should indorse the indictment: "Ordered to be tried [or re-tried] at the — quarter sessions [or assizes]."

APPLICATION for leave to appeal against conviction.

The applicant was convicted before the recorder at Wolverhampton Quarter Sessions of obtaining money by false pretences and was sentenced to three months' imprisonment to run consecutively to a previous sentence of five years' imprisonment for larceny.

No counsel appeared.

LORD GODDARD, C.J., delivered the following judgment of the court. This is an application for leave to appeal against conviction. There is no ground for granting that application, but the court thinks it desirable to state what has happened in this case and to give a ruling or direction to quarter sessions with regard to the practice where an indictment found at one quarter sessions is for any reason ordered to be tried at another quarter sessions.

The applicant was originally indicted at the midsummer quarter sessions for the county borough of Dudley for obtaining money by false pretences. He was tried by the learned recorder and the jury disagreed. The learned recorder then made an order for the re-trial of the case at the West Bromwich Borough Quarter Sessions. According to a note which had been indorsed on the indictment, the recorder at West Bromwich felt a difficulty about trying the case because he had been concerned professionally with the applicant on other occasions, and he ordered that the indictment should be tried at the Worcestershire County Quarter Sessions. No formal indorsement was made on the indictment, and when it got to the Worcestershire Quarter Sessions the chairman refused to try the case because an indorsement had not been put on the indictment directing that it was to be tried at the Worcestershire Quarter Sessions. Accordingly, he sent it back to West Bromwich, and the recorder of West Bromwich sent it to be tried at Wolverhampton, where it was at last tried.

It is unfortunate that an indictment should be sent backwards and forwards in this way merely because there has not been an indorsement put on it, and

this court, having examined s. 14 (2) of the Criminal Justice Act, 1925, finds that it does not provide that a court which is remitting a case for trial at some other place must indorse on the indictment an order that the case is to be tried there. The proper course is for the clerk of the peace to forward all the documents in the case, together with the indictment, and then the court which is to try the case will be informed that the case has been sent to it for trial from the original court. The only regulations with regard to the provisions of the section are contained in the Assizes and Quarter Sessions (Convenient Court) Order, 1926 (S.R. & O., 1926, No. 774), art. 1 of which provides:

"(c) all recognisances, inquisitions, depositions (including exhibits thereto) and documents shall be transmitted to the proper officer of the court at which the person is to be tried or re-tried; (d) any commissions, writs, precepts, indictments, recognisances, proceedings and documents may be altered so far as may be necessary for the purpose of giving effect to the said s. 14 and to this order."

That is a provision merely that indictments may be altered so far as is necessary to give effect to s. 14. Section 14 (2) enables the foreign court to try the case, and there is no reason why, when the matter was before the Worcestershire Quarter Sessions and they were informed that the indictment had been received from West Bromwich, the court of trial in the indictment should not have been altered to the general quarter sessions of the peace for the county of Worcester. They could have altered it themselves. Quarter sessions should understand that neither the statute nor the order compels the remitting court to alter the documents, although, no doubt, it would often be very desirable that they should put some such indorsement on the indictment as: "Ordered to be tried at such and such a court". When the Worcestershire Quarter Sessions received this indictment they could have been informed that it had been received from another quarter sessions, that the recorder there had transferred the case, for whatever reason, for them to try, and they could have altered the place of trial named in the indictment—which is the only thing that need be altered—and the case could have proceeded.

*Application refused.*

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LYNSKEY, J.)

Feb. 23, 1953

## SURREY COUNTY COUNCIL v. MINISTRY OF EDUCATION

*Education—Transport of children to and from school—Payment of cost of public transport to point within three miles of school—"Suitable arrangement" by the education authority—"Reasonable travelling expenses"—Education Act, 1944 (7 and 8 Geo. 6, c. 31), s. 39 (2) (c), s. 55 (2) (as amended by Education (Miscellaneous Provisions) Act, 1948 (11 and 12 Geo. 5, c. 40), s. 11, sched. I, Part I).*

For secondary school children who lived more than three miles from school the S. county council, as education authority, adopted a scheme under which they paid the cost of transport by public conveyance of these children, not for the whole distance, but to a point three miles from the school, so that the cost of travelling the last three miles to school fell on the parents of the children. On a summons to determine whether this was a permissible or suitable scheme under the Education Act, 1944,

**HELD:** the effect of s. 39 (2) (c) of the Act of 1944 was that, for a child who lived more than three miles from school, the education authority must make "suitable arrangements . . . for his transport to and from the school"; those words meant transport over the whole distance between home and school; and, therefore, payment of travelling expenses only to a point three miles from the school could not be a "suitable arrangement" within s. 39 (2) (c) of the Act, and was not a valid exercise of the council's power to pay "reasonable travelling expenses" under s. 55 (2) of the Act (as amended) in lieu of providing transport under s. 55 (1).

**ORIGINATING SUMMONS** to determine whether a scheme put into operation by the Surrey County Council for the transport of children to school was suitable and within their authority under s. 39 (2) (c) of the Education Act, 1944, and s. 55 of the Act of 1944, as amended by the Education (Miscellaneous Provisions) Act, 1948, s. 11 and sched. I, Part I.

Up to March, 1952, the Surrey County Council, in fulfilment of their obligations under the Education Act, 1944, had provided transport to school for children living more than three miles away from their schools or had paid for the cost of such transport under s. 55 (2) of the Act. In March, 1952, following a circular letter from the Minister of Education of December, 1951, urging education authorities to curtail expenditure on the transport of children to school so far as possible, the council adopted three schemes to effect a reduction of such expenditure. Two of the schemes were approved by the Minister, and the third, which arose for consideration by the court, was that the full cost of transport by public conveyance to and from school should no longer be paid for secondary school children, that expenditure should be limited to partial payment of fares in such a way that no child had a longer distance than three miles to, and three miles from, school to travel unaided, and that the council should pay the parents in advance a sum equal to the cost of the fare necessary to bring the child within the three miles' limit. Provisions were made for deductions for absence and for special treatment of hard cases.

On being approached by the council the Minister took the view that this scheme was not a proper or lawful one within the Education Act, 1944. The council, therefore, submitted for the consideration of the court two questions: (i) Whether, on the true construction of s. 55 (2) of the Education Act, 1944 (as amended by the Education (Miscellaneous Provisions) Act, 1948), the council was authorised to make such arrangements as those described, and (ii) Whether

it was a question of fact in each individual case whether such arrangements were suitable arrangements, within the meaning of s. 39 (2) (c) of the Act, for the transport of a child to and from the school at which he was a registered pupil.

*Harold Williams, Q.C., and S. B. R. Cooke* for the county council.

*J. P. Ashworth* for the Ministry.

**LYNSKEY, J.**, stated the facts and continued: The answer to the questions put to me depends on the construction of s. 55 of the Education Act, 1944, as amended by the Education (Miscellaneous Provisions) Act, 1948, s. 11 and sched. I, Part I, and that of s. 39 of the Act of 1944, and, in addition, the general scheme of the latter Act as indicated by its terms. As I follow the Act, it imposes on an education authority the obligation to provide education of different standards. I am concerned here particularly with primary education, the council having to provide primary education within the confines of its jurisdiction. That is a mandatory obligation imposed on the local education authority. Under the terms of the Act the local education authority originally had to submit schemes for the approval of the Minister. Under s. 11 (2) (g) of the Act of 1944 such schemes must include particulars of information as to

" . . . measures which the authority propose to take in fulfilment of their duty to secure the provision of schools for providing primary and secondary education, such as the making of general arrangements for the transport of pupils to and from school."

That, apparently, is one of the primary obligations imposed on the education authority. There is an equal duty imposed on parents to see that their children take advantage of the educational facilities provided. Section 36 of the Act provides:

" It shall be the duty of the parent of every child of compulsory school age to cause him to receive efficient full-time education suitable to his age, ability, and aptitude, either by regular attendance at school or otherwise."

Then provision is made by s. 37, if the child is not at school, for the making of a school attendance order, and then there is imposed on the parent the obligation of sending the child to the school of which such school attendance order requires him to be a registered pupil.

Section 39 deals with the question of the obligation of the parent to send his child to school. It provides:

" (1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section. (2) In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave . . . "

After mentioning prevention of attendance by reason of sickness and non-attendance on religious holidays, s. 39 (2) continues:

" (c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home, and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation for him at or near the school or for enabling him to become a registered pupil at a school nearer to his home."



Then by s. 39 (5) "walking distance" is defined:

"... the expression 'walking distance' means, in relation to a child who has not attained the age of eight years two miles, and in the case of any other child three miles, measured by the nearest available route."

So that, on the face of s. 39, if a parent did not send his child to school, and the child lived outside the three miles' radius of the school and no transport was provided for him, the parent would be excused for the child's non-attendance.

It is said on behalf of the county council that their obligation is imposed by s. 55 and not by s. 39. Section 55 as amended runs:

"(1) A local education authority shall make such arrangements for the provision of transport and otherwise as they consider necessary or as the Minister may direct for the purpose of facilitating the attendance of pupils at schools or county colleges or at any course or class provided in pursuance of a scheme of further education in force for their area, and any transport provided in pursuance of such arrangements shall be provided free of charge. (2) A local education authority may pay the whole or any part, as the authority think fit, of the reasonable travelling expenses of any pupil in attendance at any school or county college or at any such course or class as aforesaid for whose transport no arrangements are made under this section."

The county council argue that they have not made arrangements under s. 55 (1) because the arrangements under that sub-section are "arrangements for the provision of transport and otherwise"—not "or otherwise"—and I think it is conceded by the council (if not, it is clearly my view) that s. 55 (1) relates to the actual provision of transport as such either with hired vehicles or their own vehicles or by other means—maybe by providing a short cut over some obstacle which would otherwise make the distance more than three miles and so reduce it to under three miles. This scheme is not providing transport in the sense required by s. 55 (1). The scheme here is for the provision of the cost of a child using public transport. It is a provision made under s. 55 (2); and it can only be made in the case of a child for whose transport no arrangements are made under s. 55 (1). It seems clear that no transport has been provided in the case of the children for whom this scheme is intended to provide, but the scheme is to pay the reasonable travelling expenses, either in whole or in part, of the children who live more than three miles away from the school at which they are registered pupils.

The county council are saying, in effect, that they have a discretion as to what they shall pay. They have to make arrangements for facilitating the attendance of pupils at school, and the argument on behalf of the council is that by their scheme they are providing payment in respect of the child's transport which will enable the child to reach the school by walking less than three miles. It will be taken from outside the three miles' area, or will go into the three miles' area and join some form of public transport there. The council, therefore, say that they are providing reasonable arrangements for the provision of transport or substitution for the provision of transport by payment. The case put forward on behalf of the Minister is that, if s. 55 stood alone and apart from anything else in the Act, that is a possible construction and a possible view, but, it is argued, if that view is adopted, one will get a scheme which will not prevent the parent taking advantage of the provisions of s. 39 (2) (c) if proceedings are taken against him for "truancy", and, says the Minister: "If you are going to provide a scheme for making arrangements

of that sort, that is obviously not a suitable arrangement within the words of s. 39 (2) (c) ". I gather counsel for the Surrey County Council agrees that if his scheme would leave it open to the parent of a child residing outside the area to take advantage of that excuse, then his scheme could not be considered a proper scheme within the meaning of s. 55.

In my view, this case turns on the interpretation of s. 39 (2) (c) and s. 39 (5). The question is: Has the council made suitable arrangements for the transport to and from the school of a child who lives more than three miles from the school—and "to and from the school" in that context means to and from the child's home to the school. I should have thought that could have only one meaning because the English of it is too clear. Provision has to be made, if the child lives more than three miles distant from his school, for transport to and from the school and the home. It seems to me that to suggest that transport to a point three miles away from the school—which would mean not transport to the school, but transport part of the way to the school—cannot be read into those words. In this case the scheme is to provide a substitute for transport by payment, but, in my view, the reasoning applicable to the provision of transport must apply equally to the reason for payment as a substitute for transport. If, in fact, the obligation is to provide transport to and from the school when the child is resident more than three miles away from the school, then equally I am satisfied that the substitute for transport in the shape of payment for public transport must be of the same character and must provide for payment of the sum which will cover the cost of taking the child by public transport from a point reasonably near his home to a point reasonably near the school—I do not say to the school door, but reasonably near thereto. In those circumstances, on my view of the law, the answer I must give to the first question is "No". In my opinion, on the true construction of s. 55 of the Education Act, 1944, as amended by the Act of 1948, the council are not authorised to make such arrangements as they propose. On the second question, I accept the answer which has been suggested to me by counsel for the Ministry that the proposed arrangements as a matter of law are not "suitable arrangements" within the meaning of s. 39 (2) (c).

Solicitors: *Wyatt, Jeffery & Co.*, agents for *W. W. Ruff*, Kingston-on-Thames (for the county council); *Treasury Solicitor* (for the Ministry).

M.M.

QUEEN'S BENCH DIVISION

(BYRNE, J.)

Feb. 24, 25, 26, 27, 1953

COOTE v. EASTERN GAS BOARD

*Gas—Nationalisation—Period of limitation—Action in tort by employee against area gas board—Cause of action arising before transfer of undertaking to board—Gas Act, 1948 (11 and 12 Geo. 6, c. 67), s. 14 (2), s. 17 (5).*

In 1945 the plaintiff, who had worked as a stoker in the vertical retort house of a gas undertaking for a number of years, began to suffer from pulmonary emphysema and bronchitis which, he alleged, was caused by the failure of his employers to provide adequate ventilation and/or to take all practicable measures to protect him against the inhalation of dust or fumes in the retort house. On May 1, 1949, the gas undertaking at which he worked became vested in the defendant area gas board. On Oct. 14, 1949, the plaintiff issued a writ against the defendants claiming damages for breach of statutory duty under ss. 4 and 47 of the Factories Act, 1937, by their predecessors, the gas undertaking.

HELD: in view of the provisions of s. 17 (5) of the Gas Act, 1948, that a person should have the same rights and remedies against the gas board in respect of liabilities taken over by the board as if the liabilities had always been those of the board, the appropriate limitation period was the normal one of six years under s. 2 (1) (a) of the Limitation Act, 1939, and not the period of three years provided by s. 14 (2) of the Act of 1948, and, consequently, the action was not statute barred.

ACTION for damages against the defendants for breach of statutory duty to provide and maintain suitable and effective ventilation of their work premises and for failing to prevent the accumulation of dust, fumes and impurities and their inhalation by employees, contrary to s. 4 and s. 47 of the Factories Act, 1937, whereby the plaintiff suffered injury to his health.

The plaintiff, who was fifty-seven years old, entered the employment of the Luton Gas Company in 1919 as a water gas plant operator. In 1937 he became a stoker in the vertical retort house, and, apart from two short periods in 1941 and 1942, he worked as a stoker till 1948, when, owing to the state of his health, he ceased to be a stoker and became a slot meter collector. By virtue of the Gas Act, 1948, s. 17 (1), the Luton Gas Company was dissolved and its undertaking became vested in the defendants on May 1, 1949, the plaintiff thereby becoming the employee of the defendants from that date. During the first half of 1945, the plaintiff found difficulty in breathing. In 1947 his doctor, not being satisfied with his condition, had him X-rayed. Shortly afterwards the plaintiff became ill with pneumonia. On Mar. 10, 1948, he was admitted to hospital and remained there till Apr. 22, 1948, suffering from bronchitis. On being examined on Sept. 10, 1948, and subsequently, the plaintiff was found to be suffering from emphysema and bronchitis. The writ in the action was issued on Oct. 14, 1949.

It was contended on behalf of the defendants that the plaintiff's cause of action arose in 1945 when his health was first affected, and that, as the writ in the action was not issued till Oct. 14, 1949, the plaintiff's action was statute-barred under s. 14 (2) of the Gas Act, 1948.

*Stephen Chapman* for the plaintiff.

*Baker, Q.C., and Sir Shirley Worthington-Evans* for the defendants.

BYRNE, J., stated the facts and continued: The defendants contend that the cause of action arose in 1945, and that, as this writ was not issued until Oct. 14, 1949, the action is statute-barred, and they base their contention

on s. 14 (2) of the Gas Act, 1948, by which the period of six years which is provided in s. 2 (1) of the Limitation Act, 1939, is reduced to three years.

Under s. 17 (1) of the Gas Act, the Luton Gas Co. was dissolved, and its undertaking was vested in the defendant gas board on May 1, 1949. Section 17 (5) of the statute provides as follows:

"Without prejudice to the generality of the preceding provisions of this section, where any right, liability or obligation vests by virtue of this Act, the appropriate board and all other persons shall, as from the vesting date, have the same rights, powers and remedies (and in particular the same rights as to the taking or resisting of legal proceedings or the making or resisting of applications to any authority) for ascertaining, perfecting or enforcing that right, liability or obligation as they would have had if it had at all times been a right, liability or obligation of the board, and any legal proceedings or applications to any authority pending on the vesting date by or against the undertaker, in so far as they relate to any property, right, liability or obligation vested by virtue of this Act or to any agreement or document which has effect in accordance with sub-s. (3) or sub-s. (4) of this section or to any enactment applied by or under this Act, shall be continued by or against the appropriate board to the exclusion of the undertaker."

I take that section to mean that, if the gas board take over the liabilities of a private undertaking (as was the case here), they take them over subject to the six years' limitation period, but that, thereafter, when they do something in their own name as a gas board, they have the protection of the three years' period mentioned in s. 14 (2). If s. 17 (5) does not mean that, it seems to me that it would produce a state of injustice, because one can well envisage a case in which a person, prior to the vesting day, was within the six years within which he could bring an action against the company which was dissolved on the vesting day, and then, the vesting day having arrived, it would mean that the right of action which had existed, so to speak disappeared overnight because the six years had been reduced to three. I do not read this section as meaning that such an injustice should be effected, but I take it to mean what I have already stated, and that is, that applying it to this case this plaintiff is not statute-barred, for he had the six years within which to bring his action. I, therefore, hold, so far as this aspect of the case is concerned, that the action is not statute-barred.

[HIS LORDSHIP then considered in detail the evidence of the witnesses with regard to the ventilation, heat, and the state of the air in the vertical retort house. He found that the circulation of air was quite adequate and that no injurious fumes or dust were produced and in consequence the defendants were not in breach of their statutory duties under s. 4 and s. 47 of the Factories Act, 1937.]

*Judgment for the defendants.*

Solicitors: *L. Bingham & Co.* (for the plaintiff); *Barlow, Lyde & Gilbert* (for the defendants).

M.M.



PRACTICE NOTE.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(DAVIES, J.)

Mar. 6, 1953

HEARN v. HEARN AND JARVIS

*Justices—Husband and wife—Maintenance and separation orders—Copies—Duty to supply properly certified copies.*

UNDEFENDED PETITION by the husband for dissolution of marriage on the ground of the wife's adultery.

Interim and final orders had been made in favour of the wife by a court of summary jurisdiction under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, but had later been revoked on the wife's application. The husband pleaded in his petition the original and the revocation orders as "previous proceedings" in accordance with the Matrimonial Causes Rules, 1950, r. 4 (1) (h). At the hearing of the suit, the husband produced a proper copy of the revocation order. DAVIES, J., asked for copies of the interim and final orders, which, on production, proved to be documents signed by the clerk, but not stamped or sealed.

*Scholfield (G. B. M. Reed with him) for the husband.*

DAVIES, J., in the course of his judgment said that when clerks to magistrates or justices were asked to supply copies of orders made under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, they were under a duty to supply properly authenticated copies, bearing the seal or stamp of the magistrate or justices or otherwise properly certified so as to show clearly their source and authenticity, and that it was improper to supply copies not so authenticated. Counsel should not draft divorce petitions until they had such copies available to them.

Solicitors: *Hargreaves* (for the husband).

G.F.L.B.

## HOUSE OF LORDS

(LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID AND LORD COHEN)

Feb. 2, 3, 4, Mar. 9, 1953

## INLAND REVENUE COMMISSIONERS v. CITY OF GLASGOW POLICE ATHLETIC ASSOCIATION

*Police—Charity—Provision of recreation for police officers—Encouragement of athletic sports—Finance Act, 1921 (11 and 12 Geo. 5, c. 32), s. 30 (1) (c), (3) (as substituted by Finance Act, 1927 (17 and 18 Geo. 5, c. 10), s. 24).*

In 1938 various clubs connected with a city police force merged in an association of which the objects were "to encourage and promote all forms of athletic sports and general pastimes". The chief constable was president of the association, and all resolutions and decisions passed at meetings of the association were subject to his approval. Membership was confined to officers and ex-officers of the city police force, and, until 1947, was compulsory for a police officer. Members paid a small subscription, which was deducted from their pay.

HELD (LORD OAKSEY dissentiente): although the association had official importance and a public aspect, its provision of recreation for members was an essential non-charitable purpose which was not subsidiary or incidental to the furtherance of a public purpose, and, therefore, the association was not a body established for charitable purposes only within the Finance Act, 1921, s. 30 (3), and it was not entitled to exemption from income tax under s. 30 (1) (c) of that Act.

*Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* ([1946] 1 All E.R. 501), applied.

*Re Good* ([1905] 2 Ch. 60) and *Re Gray* ([1925] Ch. 362), considered.

APPEAL by the Crown from an order of the First Division of the Court of Session made on a Case stated by the Special Commissioners of Income Tax.

The Special Commissioners held that, having regard to such cases as *Re Good* (1) and *Re Gray* (2), the City of Glasgow Police Athletic Association was a charity and exempt from income tax under the Finance Act, 1921, s. 30 (1) (c), as amended by the Finance Act, 1927, s. 24. The First Division held that it was bound to treat English law as a matter of fact, and that the only course open to it was to treat the determination of the Special Commissioners as a finding of fact for the Scottish courts.

*The Lord Advocate* (J. L. Clyde, Q.C.), J. H. Stamp, Sir Reginald Hills and W. R. Grieve (of the Scottish Bar) for the Crown.

*Hunter*, Q.C. (of the Scottish Bar), Wilfrid Hunt and W. I. R. Fraser (of the Scottish Bar) for the City of Glasgow Police Athletic Association.

The House took time for consideration.

Mar. 9. The following opinions were read.

**LORD NORMAND:** My Lords, the question in this appeal is whether the respondent association is a body of persons established "for charitable purposes only". If so, it is agreed that the profits of a trade, namely, the holding of annual athletic sports, carried on by them, will be exempt from income tax under sched. D, by virtue of the Finance Act, 1921, s. 30 (1) (c), as amended by the Finance Act, 1927, s. 24.

I will first summarise the facts found in the Case stated by the Special Commissioners. Before 1938 there were various clubs connected with the City of Glasgow

(1) [1905] 2 Ch. 60.

(2) [1925] Ch. 362.

Police. In February, 1938, they were merged in the respondent association, which was established at that time in order to co-ordinate the various athletic and sporting activities of the members of the police force. Attention must be drawn to certain excerpts from the general rules of the association.

"Rule 2. Objects.—The objects of the association shall be to encourage and promote all forms of athletic sports and general pastimes. Rule 3. Officers.—. . . The chief constable shall be president and the assistant chief constables and superintendents of the force shall be vice-presidents. Rule 4.—Management of the association shall be vested in an executive committee, divisional activities by a divisional committee, and each branch of sport or pastime by a sectional committee. Rule 5. Committees.—(1) Executive committee.—The executive committee shall consist of the president, two vice-presidents, one representative from each divisional committee, one representative from each sports sectional committee, the honorary general secretary and the honorary treasurer, ten to form a quorum. (2) Divisional committees.—The annual general meeting of each division shall be held in the second week of September . . . The business to be transacted at such meetings shall be . . . (b) to elect the divisional committee, consisting of superintendent, lieutenant, inspector, two sergeants and five constables. Rule 8. Membership.—Ordinary membership shall be restricted to officers and ex-officers of the City of Glasgow Police Force. Rule 10. Subscriptions.—The subscription for each serving member shall be 3d. per week deducted from pay. Rule 21. Alteration of rules.—None of the foregoing rules shall be altered or revoked save by a two-thirds majority of those present at the annual general meeting or at a special meeting called for the purpose. Rule 23. Sanction of the Chief Constable.—All resolutions and decisions passed at all meetings of the association are subject to the approval of the chief constable."

Membership of the association was, until 1947, a condition of service for all new entrants into the Glasgow Police Force. In 1948 membership became voluntary but in fact all recruits have continued to join the association. The present membership is about eighty-five per cent. of the force, and there were in September, 1950, nine ex-officers who retained their membership. Ex-officers can render useful services as coaches. The activities of the association include angling, athletics, badminton, billiards, bowling, boxing and wrestling, cricket, association football, golf, rugby football, shooting, swimming and training in life saving, table tennis, dances, omnibus runs, "mystery tours" by omnibus, and whist drives. Sports are held in May of each year as a preparation for the annual sports, the "trade" carried on by the association for the purpose of raising funds. These annual sports are held on the ground of an amateur association football club, the use of which is given without charge. There is an attendance of about fifty thousand people, who pay for entry, and the profits are applied solely to the purposes of the association. Some events are confined to members of the association, others to members of other police clubs in Great Britain. But the majority of the events are open to all amateurs, including members of the association. Efforts are made to have some outstanding competitors to attract the public. The members of the association control the sports, the spectators and the traffic, and no charge is made for their services. The net proceeds are paid into the general fund of the association. In the year ended Sept. 30, 1950, the total revenue of the association was £2,778, of which £1,225 was derived from members' subscriptions and £1,214 from profits of the annual sports. The association is affiliated to the Police Athletic

Association, a body whose rules are approved by the Home Secretary and the Secretary of State for Scotland, and whose objects are to encourage the development of all forms of amateur sport in the police forces and to promote and control suitable competitions and championships. The relations between the respondent association and the Glasgow Police Force are close, and the association is regarded as an essential part of the police organisation. It plays a valuable part in maintaining health, morale and esprit de corps. It helps to bring the force into friendly contact with the public, and it enables the members of the association to mix with members of other professions and trades. The hours of police duty make it almost essential that some special provision should be made for the recreation of the police. The activities of the association are thus conducive to a contented, fit and efficient police force; they are a help towards recruiting, and to the promotion of good relations with the public. By these means, also, the association has directly benefited the public.

The Special Commissioners, having found these facts, rejected the only contention then put forward on behalf of the Crown that, by reason of the wide nature and extent of the objects of the association, it was not a body of persons established for charitable purposes only. They were aided in arriving at this conclusion by such cases as *Re Good* (1) and *Re Gray* (2). As I shall not have occasion to refer to these cases again I will say now that so far as they are founded on the principle that gifts exclusively for the purpose of promoting the efficiency of the armed forces are good charitable gifts, they are, in my opinion, unassailable, but that the decision that the actual gifts were of that nature is more doubtful. I would hold further that gifts or contributions exclusively for the purpose of promoting the efficiency of the police forces and the preservation of public order are by analogy charitable gifts.

The Stated Case came before the First Division of the Court of Session. Their Lordships did not address themselves to a discussion and decision of the question of law submitted for their opinion:

"... whether the City of Glasgow Police Athletic Association is, within the meaning and for the purposes of s. 30 of the Finance Act, 1921 (as amended by s. 24 of the Finance Act, 1927), a charity, namely a body of persons established for charitable purposes only."

The Lord President pointed out that *Income Tax Special Purposes Comrs. v. Pemsel* (3), decided that the words "charity" and "charitable" in the Income Tax Act, 1842, must be construed in their technical meaning according to English law. The words which have to be construed under the Acts now in force are the same. *Pemsel's* case (3) also disapproved of *Baird's Trustees v. Lord Advocate* (4) in which Lord President INGLIS had held that the words "charitable purposes" in the Act of 1842 were to be interpreted in their popular signification as meaning the relief of poverty. Plainly, *Pemsel's* case (3) laid down the rule for construing "charity" and "charitable" as one to be observed both by the courts in England and by the Court of Session. The advantage for Scottish taxpayers of this rule over the construction accepted in *Baird's Trustees* (4) is obvious and considerable. The Lord President proceeds to say that the general law of charities has progressed in England and Scotland since *Pemsel's* case (3) was decided and that there is a considerable and growing divergence. His conclusion is that the Court of Session cannot invest itself with the unique attributes of

(1) [1905] 2 Ch. 60.

(2) [1925] Ch. 362.

(3) 55 J.P. 805; [1891] A.C. 531.

(4) (1888), 15 R. (Ct. of Sess.) 682; 25 Sc.L.R. 533.



the Chancery Division or perform the functions which belong to the system of law there administered, and that the difficulty in which the Court of Session finds itself, hitherto evaded, must now be faced. His solution of the problem is that the English law of charities is foreign law and a matter of fact for the Court of Session, and, therefore, that the only course open to him was to take the determination of the Special Commissioners as a finding of fact for the Scottish Courts. With this mode of disposing of the Stated Case the other members of the court agreed. They professed a sense of incapacity to deal with the case in any other way.

My Lords, I will not disguise that I have a certain sympathy with the Scottish judges, who feel embarrassed at having to administer as part of the law of Scotland a difficult and technical branch of English law. For I have had in the Court of Session some, though not a large, experience of this jurisdiction, and I felt the embarrassment. Nevertheless, I must at once say that there has been here a failure to exercise a jurisdiction which the court had a plain duty to exercise. In *Pemsel's* case (1) it was decided authoritatively that it was part of the jurisdiction of the Court of Session as Court of Exchequer in Scotland to administer this branch of English law in claims for exemption by charities. Since then the Finance Act, 1925, s. 19, has provided that claims for exemption by charities were in future to be made to the Inland Revenue Commissioners and were to be determined by the Special Commissioners in like manner as an appeal made to them against an assessment under sched. D, and that all the provisions of the Income Tax Acts relating to such an appeal (including the provisions relating to the statement of a Case for the opinion of the High Court on a point of law) shall apply accordingly with any necessary modifications. For Scottish subjects the appeal on law is, of course, to the Court of Session (Income Tax Act, 1918, s. 235 and s. 149 (3)). The Court of Session has, therefore, a statutory duty to decide any question of law that may come before it in a claim to exemption, and the law which it must administer is the English law of charity.

The necessary effect of *Pemsel's* case (1) and now also of the provisions of s. 19 of the Act of 1925 is that the English law of charity has, for income tax purposes and for them alone, to be regarded as part of the law of Scotland and not as a foreign law. The practical difficulties for a Scottish lawyer are considerable, but I would not have them exaggerated. These difficulties spring mainly from the nature of charity and from the way in which the law of charity has grown up. I need not enlarge on this for it is an aspect of the English law which has been recently sufficiently commented on with special authority by LORD SIMONDS in *Gilmour v. Coats* (2) ([1949] 1 All E.R. 856) and in *Oppenheim v. Tobacco Securities Trust Co., Ltd.* (3) ([1951] 1 All E.R. 34). I venture, however, to say that many of the difficulties felt by Scottish lawyers in administering this law, are scarcely less felt by English equity lawyers, and that the general Scots law of charities likewise has difficulties of its own. It has never yet, for example, been found possible to define in generally accepted terms what is the precise meaning of charity in Scottish law, and one reason is that the Scots law of charities owes nothing to the great institutional writers, and much of it, like its counterpart in England, has been built up piecemeal by the decisions of the courts.

The duty of the Court of Session to apply the English law of charities in

(1) 55 J.P. 805; [1891] A.C. 531.

(2) [1949] 1 All E.R. 848; [1949] A.C. 426.

(3) [1951] 1 All E.R. 31; [1951] A.C. 297.

income tax cases has been expressly recognised in *Jackson's Trustees v. Inland Revenue* (1) by Lord President CLYDE and LORD SANDS. In that case the limits of the rule were defined. It was also recognised and applied in *Trustees for Roll of Voluntary Workers v. Inland Revenue* (2). Among the consequences of the action taken by the First Division in this case is to cast some doubt on these cases and to deprive Scottish claimants of an effective right to appeal from the determination of the commissioners. In certain respects the jurisdiction is less embarrassing than their Lordships seem to have supposed. They are technically not bound by the decisions of the English courts in the matter of charities and it is not improper for them to discuss or criticise English decisions. The Court of Session is not reduced to the role of an obsequious follower of decisions either of a judge of first instance or of the Court of Appeal, though it is only good sense to pay special regard and respect to the decisions and opinions pronounced by the English courts on a branch of the law built up by English judges, and familiar to them by long training and experience.

I come now to the merits of the appeal and I unfeignedly regret that I must do so without the aid of the opinions of the learned judges of the First Division, especially as the issue, though not easy, owes none of its difficulty to technicalities of English law. The respondents' contention is that the association falls within the last category of LORD MACNAGHTEN's classification of charities, and that it is established for charitable purposes only. In looking for the purposes for which it is established I begin with the rules. The objects set out in r. 2, to encourage and promote all forms of athletic sports and general pastimes, are not charitable purposes. But it will not do to stop there. The next step is to notice that the members' subscriptions are exclusively spent on their own sports and recreations. In order to augment the fund expendable for these purposes the members carry on the trade of holding the annual sports. So far, again, there is no element of charity and the purposes are self-regarding. In *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (3), voluntary collections from employees of the munition factories belonging to a certain company were to be used to relieve without a means test the distress suffered by the employees from air raids. It was held by COHEN, J., that this was not a charity and this decision was affirmed by the Court of Appeal. LORD GREENE, M.R., said:

"The point, to my mind, which really puts this case beyond reasonable doubt is the fact that a number of employees of this company, actuated by motives of self-help, agreed to a deduction from their wages to constitute a fund to be applied for their own benefit without any question of poverty coming into it. Such an arrangement seems to me to stamp the whole transaction as one having a personal character, money put up by a number of people, not for the general benefit, but for their own individual benefit."

MORTON, L.J., said:

"... those eligible to receive benefits were not even all the employees of the particular company. They were those who chose to join in the scheme ..."

In *Oppenheim's* case (4) LORD SIMONDS expressed his full agreement with all that was said by LORD GREENE, M.R., and MORTON, L.J., in *Hobourn's* case (3).

(1) 1926 S.C. 579.

(2) 1942 S.C. 47.

(3) [1945] 2 All E.R. 711; [1946] Ch. 86; *affd.* C.A., [1946] 1 All E.R. 501; [1946] Ch. 194.

(4) [1951] 1 All E.R. 31; [1951] A.C. 297.

The case is an authority against recognising as a charity a body that merely applies the subscriptions of its members to their own recreation. It does not, of course, prejudice the question whether in certain circumstances the benefit of members is not subsidiary and incidental to another and charitable purpose.

It would be unjust to the respondent association to represent it as having no purpose beyond the recreation and amusement of the individual subscribers constituting its membership. No one can read the rules without perceiving that the association was regarded as having an official importance and a public aspect. And in order to ascertain what the purposes of an association are, the court is not limited to consideration of its rules or its constituent documents. They are very important and it would be difficult for an association to say that something declared in its rules to be its object was not one of its purposes. But it is quite in order for the association to prove by parol evidence that it had other purposes than that set down in the rules. The Special Commissioners had evidence before them which entitled them to find that among its purposes were the encouragement of recruiting, the improvement of the efficiency of the force, and the public advantage. This is a purpose which the Special Commissioners were entitled to hold in law to be a public charitable purpose, but there remains the non-charitable purpose of providing recreation to the members. The question is whether this non-charitable purpose is incidental to the public charitable purpose. If not, it cannot be said that the association was a body established for charitable purposes only. This is not a matter of the motive of the members of the association or of the high police officials who took a part in furthering the association, though there is a natural probability that their motives agree with the purposes of the association. The question is what are the purposes for which the association is established, as shown by the rules, its activities and its relation to the police force and the public. And what the respondents must show in the circumstances of this case is that, so viewed objectively, the association is established for a public purpose, and that the private benefits to members are the unsought consequences of the pursuit of the public purpose, and can therefore be disregarded as incidental. That is a view which I cannot take. The private benefits to members are essential. The recreation of the members is an end in itself, and without its attainment the public purpose would never come into view. If the result of establishing the association had been that the members had, instead of being interested, found themselves involved in wearisome and lifeless activities, their efficiency would have suffered, the membership would have fallen off, and there would have been public detriment instead of public benefit. The private advantage of members is a purpose for which the association is established and it therefore cannot be said that this is an association established for a public charitable purpose only. In *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (1) ATKIN, L.J., considered the problem of societies having more than one purpose. He says:

"First of all it is said: No, this society was in fact formed for the purpose of giving benefit to its members; it is nothing but a club for the mutual advantage of the members of the club. If that were so I agree that the claim of the society would fail, both because it could not be said that the society was established for a charitable purpose, and because it certainly could not be said that it was established for a charitable purpose only. There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members

(1) [1928] 1 K.B. 611.

should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only."

In principle, therefore, if an association has two purposes, one charitable and the other not, and if the two purposes are such and so related that the non-charitable purpose cannot be regarded as incidental to the other, the association is not a body established for charitable purposes only. I would allow the appeal.

**LORD OAKSEY:** My Lords, I agree with what has been said by the noble Lord on the Woolsack as to the function of the Court of Session in tax cases. On the merits of the appeal I have had much difficulty and have come to the conclusion that the appeal ought to be dismissed. In my opinion, the efficiency of a police force is largely dependent on the activity and physical fitness of its members, and athletic and other sports ought to be and are encouraged by those responsible for such forces. It is clear, too, that the efficiency of the police is a matter of public importance which falls within the class of charitable purposes to which the exemption in the Finance Act, 1921, s. 30, applies. The question then is whether the City of Glasgow Police Athletic Association is a body of persons established for public charitable purposes only.

Now, it is clear that "purposes" are not the same as "results" and there is ample authority that a body of persons or trust may be established for charitable purposes only although its establishment has results which are not charitable, for instance, the benefits derived by the officers in the cases of *Re Good* (1), in *Re Gray* (2), and by the surgeons in the *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (3). As **LORD MACNAGHTEN** said in *Inland Revenue Comrs. v. Forrest* (4):

"It cannot I think be doubted that the institution has raised the standard of the profession, and that to a civil engineer it is of advantage and probably of pecuniary advantage to be a member. But is that result the purpose of the society, or is it an incidental, though an important and perhaps a necessary consequence of the way in which the institution does its work in the pursuit of science?"

The purposes for which a body of persons is established can only be discovered from the constitutional document, if there is one, which establishes the body. In the present case, in my opinion, the constitution and general rules of the respondents indicate that the purpose of the body was the efficiency of the force. There can, in my opinion, have been no other reason for r. 23 which makes every resolution and decision subject to the approval of the chief constable. The chief constable is only concerned with the amusement of his men for the purpose of having a contented and efficient force. All the rules are

(1) [1905] 2 Ch. 60.

(2) [1925] Ch. 362.

(3) [1952] 1 All E.R. 984; [1952] A.C. 631.

(4) (1890), 54 J.P. 772; 15 App. Cas. 334.



framed to meet the needs of a disciplined force. It is, in my opinion, impossible to imagine that such rules would have been drawn up by anyone or by any body of men who were not intending to promote discipline. Decisions are not confided to the majority or even to a unanimous vote, but to the chief constable. It is true that no one need belong to the association, but that is equally consistent with it being the view of the chief constable or other authority who devised the scheme, which was originally compulsory, that a voluntary scheme was from its nature more likely to create the keenness and esprit de corps which have the necessary result of efficiency. The matters to which I have referred are all found as facts by the commissioners in the Special Case.

It has been argued for the Crown that the association is nothing but a club or mutual society for the benefit of the subscribers, but, in my opinion, the chief constable's veto is absolutely inconsistent with any such idea. It is true that the money subscribed comes from the members and is used for their immediate benefit, and it is argued that this negatives the idea of any public charitable purpose, but, in my opinion, it is not any more a necessary inference that the purpose of the members was their own enjoyment than that their purpose was their own efficiency. The purposes of a body of persons can only be inferred from the facts as to their association as a body; some may have one purpose, others another; but when they all submit themselves to the dictation of their commanding officer it appears to me that the reasonable inference is that they are prepared to subordinate their private purposes to his and that his purpose must be inferred to be the efficiency of the force and not its amusement.

**LORD MORTON OF HENRYTON:** My Lords, the only question arising for decision on this appeal is whether the respondent association is a "body of persons . . . established for charitable purposes only" within the meaning of the Finance Act, 1921, s. 30 (3). If the association is such a body, it is not disputed that the profit of £1,214 resulting from its annual amateur sports meeting, held during the year ending Sept. 30, 1950, is exempted from income tax by the Finance Act, 1921, s. 30 (1) (c), as amended by the Finance Act, 1927, s. 24.

The facts as to the establishment of the association are set out in the Case Stated as follows:

"Prior to 1938 there were various clubs connected with the City of Glasgow Police. In February, 1938, these clubs were merged in the association, which was established at that date with the purpose of co-ordinating the various athletic and sporting activities of the members of the police force."

Starting from this point, I have carefully considered the constitution and general rules of the association, and the facts as to its activities which are set out in the Case Stated, and I am quite unable to hold that this body of persons is established for charitable purposes only.

Rule 2 provides that: "The objects of the association shall be to encourage and promote all forms of athletic sports and general pastimes". It was accepted by the Special Commissioners, and it is not disputed by the respondent association, that these objects, stated in such general terms, are not objects which the law regards as charitable. It is rightly said, however, that the constitution and rules must be read as a whole and construed in the light of such evidence of surrounding circumstances as may be admissible. So reading them and so construing them I arrive at the conclusion that the purpose for which the

LORD MORTON OF HENRYTON, J.C. Lord Ltd., Industrial Estate, Chichester, Sussex. Saturday, May 2, 1953.

association is established is to provide for its members and their friends facilities for taking part in athletic sports and general pastimes, both outdoor and indoor. I cannot detect in this purpose any element of charity. The members pay their subscriptions and get certain benefits in return; they make a profit by running the annual amateur sports meeting already mentioned and that profit is applied to carrying out the purpose which I have just stated. So far, the association would not appear to be any more a charity than is any other athletic or social association or club established for the like purpose. The association does not, in my view, fit into any of the four "principal divisions" mentioned by LORD MACNAGHTEN in *Pemsel's* case (1), and the purpose just stated is far indeed from the "spirit and intendment" of the preamble to the statute 43 Eliz. c. 4.

Counsel for the respondent association rely strongly on the facts found in para. V of the Special Case and especially on sub-para. (f) which is as follows:

"The existence and activities of the respondent association: (i) played an important part in the maintenance of physical fitness, health, morale and esprit de corps within the force, (ii) attracted recruits to the force, (iii) helped to maintain the strength and efficiency of the force by conducting to a contented force, keeping members happy in their work and inducing them to continue in the force, rather than leave it, (iv) conducted to the public order by promoting good relations between the force and the general public, (v) increased the efficiency of the force, generally, and thereby directly benefited the public."

They contend that the achievement of the results just stated is the purpose for which the association is established, and that this is a charitable purpose. I do not doubt, my Lords, that a gift made for the sole purpose of increasing the efficiency of the police force would be a charitable gift, but the task before your Lordships is first to determine the purpose or purposes for which the association is established and then to determine whether the sole purpose is, or all the purposes are, charitable. In my view, the purpose for which the association is established, within the meaning of the Finance Act, 1921, s. 30 (3), is the non-charitable purpose which I have already stated and the achievement of the results set out in para. V is simply a consequence which will follow if the purpose for which the association is established is carried out successfully and efficiently.

Even if I were satisfied that there exists some other purpose for which the association was or is established, for instance, the purpose of maintaining the strength and efficiency of the police force, I should find it impossible to say that the sole purpose of the association is a purpose which is nowhere even mentioned in the constitution and general rules, and that the purpose which emerges so clearly in the rules and on which the income of the association appears to have been expended ever since it came into existence is either non-existent or merely incidental. Observations have been made by my noble and learned friend on the Woolsack as to the course which this case took in the First Division of the Court of Session. I agree with these observations and do not desire to add to them. I agree also with my noble and learned friend's comments on the cases of *Re Good* (2), *Re Gray* (3) and *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (4). I would allow the appeal.

(1) 55 J.P. 805; [1891] A.C. 531.

(2) [1905] 2 Ch. 60.

(3) [1925] Ch. 362.

(4) [1945] 2 All E.R. 711; [1946] Ch. 86; *affd.* C.A., [1946] 1 All E.R. 501; [1946] Ch. 194.

**LORD REID:** My Lords, the respondents claim that they are entitled to exemption from income tax under the Finance Act, 1921, s. 30, as amended by the Finance Act, 1927, s. 24. It is admitted that if they are a "body of persons . . . established for charitable purposes only" they are entitled to exemption, the other requirements of the section being satisfied.

The respondents' association was formed in 1938, apparently under official guidance. From then until 1947 membership of the association was a condition of service for all new entrants to the Glasgow Police Force. Compulsory membership was abolished in 1947, but it appears that all new entrants since that date have in fact become members. Membership is restricted to officers and ex-officers of the force: only a few ex-officers remain members and they give valuable service in coaching other members. Under the rules the management of the association is largely in the hands of senior officers of the force and all resolutions passed at meetings of the association are subject to the approval of the chief constable. The objects of the association, set out in r. 2, are to encourage and promote all forms of athletic sports and general pastimes, and later rules show that this means to provide facilities for the members to take part in those activities and to encourage them to do so. The Special Commissioners have found that the association is regarded as an essential part of the police organisation, that it plays an important part in the maintenance of health, morale and esprit de corps within the police force, that it attracts recruits to the force and that it helps to induce members of the force to continue in the force rather than leave it. Those findings amply justify the conclusion that the existence and activities of the association increase the efficiency of the force generally and thereby directly benefit the public. I do not doubt that the purpose of increasing or maintaining the efficiency of a police force is a charitable purpose within the technical meaning of those words in English law. It appears to me to be well established that the purpose of increasing the efficiency of the army or a part of it is a charitable purpose. It may be that in some cases the facts hardly justified the conclusion that this was the purpose of the gift in question but that does not affect the principle. I can see no valid distinction between the importance or character of the public interest of maintaining the efficiency of the army and that of maintaining the efficiency of the police. But it is not enough that one of the purposes of a body of persons is charitable: the Act requires that it must be established for charitable purposes only. This does not mean that the sole effect of the activities of the body must be to promote charitable purposes, but it does mean that that must be its predominant object and that any benefits to its individual members of a non-charitable character which result from its activities must be of a subsidiary or incidental character.

It was argued that this association could not be regarded as established for charitable purposes because its revenue is all spent on activities in which its members alone take part. I am not satisfied that in every case that would be enough by itself to prevent the body from being held to be established for charitable purposes only and I prefer to base my opinion on the facts of this case.

The peculiarity of this case is that the same activities have a double result. They are beneficial to the public by increasing the efficiency of the force and they are beneficial to the members themselves in affording to them recreation and enjoyment: and all the relevant facts appear to me to indicate that the purpose was to produce this double result. It may well be that considerations of public interest were the primary cause of the association being established and maintained: but I think that it is clear that all or most of the activities

of the association are designed in the first place to confer benefits on its members by affording to them recreation and enjoyment. It is only as a result of these benefits that the purpose of increasing the efficiency of the force is achieved. In some cases where the end is a charitable purpose the fact that the means to the end confer non-charitable benefits may not matter; but in the present case I have come to the conclusion that conferring such benefits on its members bulks so largely in the purposes and activities of this association that it cannot properly be said to be established for charitable purposes only. I, therefore, agree that the appeal should be allowed.

There is one other matter that I must notice. The First Division have held that they are not competent to decide what is a charitable purpose because that is purely a question of English law. In this I think that they were mistaken. It has commonly been accepted since *Pemsel's* case (1) that the words "charity" and "charitable" in income tax legislation must be interpreted according to English law, but I do not think that that is a full or accurate statement of the position. In my judgment, holding that those words must be interpreted according to English law must mean that it is to be held that Parliament enacted that on that matter the law of England should also become the law of Scotland, and it must follow that Parliament must be held to have placed on the courts of Scotland the duty of administering what was formerly only the law of England but what has been made by Act of Parliament the law of both countries. It is true that this form of legislation by reference puts the Scottish courts in some difficulty because it may not always be easy for them to discover what are the principles to be applied in a particular case—incidentally that is not always easy even for an English court. But whatever the practical difficulties may be, and whether or not those difficulties were ever appreciated by Parliament or by this House in determining what Parliament must be held to have enacted, the fact remains that Parliament must be held to have required the Scottish courts to surmount those difficulties, and the duty so placed on the Scottish courts can now only be removed by legislation.

**LORD COHEN:** My Lords, the question at issue in these proceedings is whether the respondent association is a "body of persons . . . established for charitable purposes only" and is therefore entitled to exemption under the Finance Act, 1921, s. 30, as amended by the Finance Act, 1927, s. 24. The Special Commissioners answered this question in favour of the association but stated a Case at the instance of the appellants, the question for the decision of the court being framed as follows:

"The question of law for the opinion of the court is whether the City of Glasgow Police Athletic Association is, within the meaning and for the purposes of s. 30 of the Finance Act, 1921 (as amended by s. 24 of the Finance Act, 1927), a charity, namely a body of persons established for charitable purposes only."

The First Division of the Court of Session answered this question in the affirmative. They arrived at their conclusion by treating the question as one of fact, on the ground that your Lordships' House had held in *Pemsel's* case (1) ([1891] A.C. 583) that the question whether a body of persons was a charity for the purposes of the Income Tax Acts fell to be determined according to English law and that English law in a Scottish court was a question of fact. Counsel for the association did not attempt to support that line of reasoning and I have nothing to add to what has been said by my noble and learned friend on the

(1) 55 J.P. 805; [1891] A.C. 531.



Woolsack on this aspect of the question. I turn, therefore, to the question stated by the Special Commissioners.

They based their conclusion in favour of the respondent association in substance on the decisions in the Chancery Division in *Re Good* (1) and *Re Gray* (2). In both those cases the question at issue was the validity of a gift contained in the will of a testator, the gift in the former case being of a library and plate for an officers' mess and in the latter of a fund for the promotion of sport in a regiment. The ratio decidendi of the two cases is conveniently stated by FARWELL, J., in *Re Good* (1) in the passage cited by the Special Commissioners, which reads as follows:

"I have come to the conclusion that this is a good charitable gift on the first ground—namely, that it is a direct public benefit to increase the efficiency of the army, in which the public is interested, not only financially, but also for the safety and protection of the country."

The commissioners then observed that the increase of the efficiency of police forces appeared to them analogous to the increase of the efficiency of the army, and on this ground decided in favour of the association. They omitted, however, to notice that they were not concerned with the question whether a gift for the promotion of efficiency in the police force was a valid charitable gift but with the different question whether the respondent association was formed for charitable purposes only.

This question has to be determined on the construction of the constitution and rules of the association and of the findings of fact contained in the Stated Case, but before I turn to them it will be convenient to refer briefly to some of the authorities to which your Lordships' attention was directed in the course of the argument. From them certain principles appear to be settled:—(i) If the main purpose of the body of persons is charitable and the only elements in its constitution and operations which are non-charitable are merely incidental to that main purpose, that body of persons is a charity notwithstanding the presence of those elements: *Royal College of Surgeons of England v. National Provincial Bank, Ltd.* (3). (ii) If, however, a non-charitable object is itself one of the purposes of the body of persons and is not merely incidental to the charitable purpose, the body of persons is not a body of persons formed for charitable purposes only within the meaning of the Income Tax Acts: *Oxford Group v. Inland Revenue Comrs.* (4). (iii) If a substantial part of the objects of the body of persons is to benefit its own members, the body of persons is not established for charitable purposes only: *Inland Revenue Comrs. v. Yorkshire Agricultural Society* (5). The distinction between this class of case and that contemplated in the first principle I have stated is aptly pointed out by ATKIN, L.J., in the case last cited, when he says:

"There can be no doubt that a society formed for the purpose merely of benefiting its own members, though it may be to the public advantage that its members should be benefited by being educated or having their aesthetic tastes improved or whatever the object may be, would not be for a charitable purpose, and if it were a substantial part of the object that it should benefit its members I should think that it would not be established for a charitable purpose only. But, on the other hand, if the benefit given

(1) [1905] 2 Ch. 60.

(2) [1925] Ch. 362.

(3) [1952] 1 All E.R. 984; [1952] A.C. 631.

(4) [1949] 2 All E.R. 537.

(5) [1928] 1 K.B. 611.

to its members is only given to them with a view of giving encouragement and carrying out the main purpose which is a charitable purpose, then I think the mere fact that the members are benefited in the course of promoting the charitable purpose would not prevent the society being established for charitable purposes only."

With these principles in mind I turn to the constitution and rules of the respondent association. Rule 2 declares the objects of the association to be "to encourage and promote all forms of athletic sports and general pastimes". It was common ground between the parties that if this object had to be considered *in vacuo* it would not be a good charitable purpose, but counsel for the association argued, and I think, rightly, that, read in its context, it must be limited to the promotion of sports and pastimes among the Glasgow police; not, however, as I read the document, all the Glasgow police, but only such of them and such ex-members of the Glasgow police as become and remain members of the association. So limited, said counsel for the appellants, the association is merely a private club and the observations of LORD GREENE, M.R., in *Re Hobourn Aero Components, Ltd.'s Air Raid Distress Fund* (1) were in point. In that case LORD GREENE, after citing a passage from TUDOR ON CHARITIES, 5th ed., p. 18, said, the particular association of persons with which the court was there concerned could properly be described as a mutual benefit society, which could not be charitable unless poverty was an essential qualification for participation in the benefits. There is no element of poverty to be found in the present case. Therefore, said counsel for the appellants, the respondent association is stamped with the character of a private trust.

Counsel for the association did not dispute the correctness of that decision, but argued that in the present case the purpose of the association was to maintain the strength and the efficiency of the Glasgow police force and the benefits to the membership of the association were merely incidental to that purpose.

Counsel relied on the findings of the commissioners as expressed in para. V of the Case Stated as establishing the correctness of this contention. He relied also on the following rules: r. 3 giving the superior officers of the force strong representation on the executive committee and the divisional committees; r. 10 providing for deduction of serving members' subscriptions from their pay, and, above all, r. 23 giving the chief constable a power of veto on all resolutions and decisions passed at meetings of the association.

He referred also to the finding that the sports meetings of the association received specially favourable treatment in that no charge was made for the services of the police in connection therewith. It is, I think, a fair inference from these matters and from other evidence that was before the commissioners that the association was regarded by the authorities as an essential part of the police organisation and as playing an important part in the maintenance of health, morale, and esprit de corps in the police force: but the achievement of this end was more the result of the operations of the association than an achievement of its purpose, and I am unable to draw from the evidence the conclusion that the benefits to the members were given with a view *only* to giving encouragement to the maintenance of the strength and efficiency of the Glasgow police force. These benefits were and could be given to the members and to no one else. Reading the Case Stated and the documents annexed thereto I am forced to the conclusion that the conferment of those benefits was a substantial part of the objects of the association. In my opinion, therefore,

(1) [1945] 2 All E.R. 711; [1946] Ch. 86; *affd.* C.A., [1946] 1 All E.R. 501; [1946] Ch. 194.

the association cannot be said to have been established for a charitable purpose only. I agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Solicitor for Scotland of the Board of Inland Revenue and Solicitor for England of the Board of Inland Revenue; Wedlake, Letts & Birds, agents for Rob. Walker & Orr, Glasgow, and A. & W. M. Urquhart, Edinburgh (for the respondents).*

G.F.L.B.

### QUEEN'S BENCH DIVISION

(HILBERY, J.)

Jan. 20, 21, 1953

NEWMAN v. FRANCIS

*Open Space—Preservation of order—Bye-law of local authority—Control of dogs—Plaintiff injured by dog out of control—Liability of defendant to plaintiff on ground of non-observance of bye-law.*

The plaintiff was knocked down by a dog, which was in charge of the defendant's daughter, while she (the plaintiff) walking in an open space to which bye-law 21 of the London County Council's bye-laws applied. Bye-law 21 provided: "No person shall cause or suffer any dog belonging to him or in his charge for the time being to enter or remain in any open space unless such dog be under proper control and be effectually restrained from injuring, annoying or disturbing any person or animal or from running on any flower bed or injuring any tree, shrub or plant". The plaintiff claimed that a breach of bye-law 21 gave her a right of action against the defendant on the ground that he was in breach of the bye-law.

HELD: the council's bye-laws for the regulation of the conduct of the public in the council's parks, gardens, and open spaces were intended to be enforced by the council by way of proceedings for penalties only, and did not give a cause of action at law to members of the public, either one against another for a failure to observe them or against the council for a failure to enforce them, and, therefore, the plaintiff had no right of action against the defendant in respect of a breach of bye-law 21.

#### ACTION.

On Aug. 26, 1950, the plaintiff, Mrs. Sarah Newman, was walking on Hackney Downs, an open space to which the London County Council's bye-laws relating to parks and open spaces applied, when she was knocked down and injured by the defendant's dog which was being exercised by the defendant's daughter, aged thirteen, when it jumped over the fence separating the path where the plaintiff was walking and the grass where it was being exercised. The plaintiff claimed damages for personal injuries due to her fall alleging (i) negligence against the defendant in allowing the dog to be under the control of a child aged thirteen, and against the child in respect of the way in which she managed and controlled the dog, and (ii) that the fact that the defendant's conduct was in breach of bye-law 21 of the council's bye-laws gave her a cause of action against the defendant. The case is reported only on the second point.

*Solley* for the plaintiff.

*C. Parker* for the defendant.

HILBERY, J., stated the facts, dismissed the claim based on negligence, and continued: Counsel for the plaintiff argued that on the cases the London County Council's bye-laws gave a cause of action to a member of the public

where one of those bye-laws was broken, and he relied on bye-law 21. [His LORDSHIP read the bye-law and continued:] The principle on which one has to decide whether bye-laws or regulations made under statutory powers are to be construed as giving a cause of action to a member of the public or to a particular person or class of persons in the case of a breach has been considered many times, and has recently been re-stated in the House of Lords in *Cutler v. Wandsworth Stadium, Ltd.* (1) by LORD SIMONDS. I can quote this passage from his opinion without, I think, although I tear it from the context, falsifying its force:

"The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House."

Having dealt with the force of the argument to be adduced from either the absence of penalty or its presence, he went on to say:

"It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of LORD KINNEAR in *Black v. Fife Coal Co., Ltd.* (2): 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by LORD CAIRNS in *Atkinson v. Newcastle Waterworks Co.* (3), and by LORD HERSCHELL in *Cowley v. Newmarket Local Board* (4) solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention'."

In *Cutler v. Wandsworth Stadium, Ltd.* (1), LORD SIMONDS and the other Lords held that it was a matter of penalties, and that the obligations imposed by the section of the Act they were there considering were only enforceable by proceeding for the penalties specified and not by the class of persons who were being dealt with and affected by the provisions of that particular statute.

I have carefully read through all these bye-laws, and it appears to me that, under the statute, the London County Council is given power to make enforceable bye-laws, such as these, for the regulation and conduct of their parks, gardens and open spaces. I am satisfied that these bye-laws are intended for enforcement by the public authority, the London County Council, by way of proceeding for the penalties prescribed. They are bye-laws to enable them to enforce disciplinary measures on people who go to the parks, gardens, and open spaces, both for the protection of those parks, gardens and open spaces

(1) [1949] 1 All E.R. 544; [1949] A.C. 398.

(2) [1912] A.C. 149.

(3) (1877), 42 J.P. 183; 2 Ex.D. 441.

(4) 56 J.P. 805; [1892] A.C. 345.



and the things that are therein either displayed or made available for public use or enjoyment, or in the cause of public decency. There is nothing to indicate that they are intended to give a cause of action at law to the members of the public, either one against another, or, for breach of them, against the London County Council.

With regard to bye-law 21, which is relied on so strongly, it is to be observed that it is essentially intended to protect the comfort and convenience of those using the gardens, to save them from annoyance, and, at the same time, to require them to control dogs and animals taken by them to the open space or park, but it is observable that the same bye-law is there to prevent dogs from disturbing, injuring, or running on any flower bed, or injuring any tree, shrub, or plant. It is, in other words, like the rest of the bye-laws, a power taken under statute by the council to enable them effectually to control their parks, gardens and open spaces under the penalties which those bye-laws provide, and I have no doubt that these bye-laws are not intended to give the public a cause of action in the case of the failure of the London County Council to enforce them or the failure of other members of the public to observe them.

*Judgment for the defendants.*

Solicitors: *Miller, Clayton & Co.* (for the plaintiff); *J. Clifford Watts* (for the defendant).

G.A.K.

## PROBATE, DIVORCE AND ADMIRALTY DIVISION

(DAVIES, J.)

Mar. 11, 1953

### CROSSLEY v. CROSSLEY

*Adoption—Child subject of custody order by Divorce Court—Effect of adoption on custody order—Duty of county court and justices—Adoption Act, 1950 (16 and 17 Geo. 5, c. 26), s. 10 (1), (2).*

On a decree of dissolution of marriage made in favour of the wife on Apr. 16, 1947, it was ordered that the child of the marriage should remain in the custody of the wife, but that he should not be removed out of the jurisdiction without the leave of the court. On Dec. 16, 1950, the wife re-married, and on Apr. 11, 1951, the child was adopted by the wife and her second husband. On a summons by the wife for leave to take the "child of the marriage" out of the jurisdiction,

**HELD:** by virtue of s. 10 (1) and (2) of the Adoption Act, 1950, when the adoption order was made the child ceased to be the child of any previous marriage and became the child of the marriage between the wife and her second husband, and, therefore, it was incorrect to describe the child as the "child of the marriage" which was dissolved in 1947, and the court had no power to make the order sought.

Where a person desires to adopt a child in respect of whom a custody order has been made in the Divorce Court, the application can be dealt with by a county court or a court of summary jurisdiction under the Adoption of Children Acts in the ordinary way, and it is not necessary for the discharge of the custody order to be obtained before the application is made: see direction of LORD MERRIMAN, P. (RAYDEN ON DIVORCE, 2nd supp. to 5th ed., p. B 63).

**SUMMONS ADJOURNED INTO COURT.**

*Crispin* for the wife.

**DAVIES, J.:** This is an application by Mrs. Edith Gertrude England, as she now is, for leave to take what is described in the summons as "the child of the marriage, Brian Michael" out of the jurisdiction of the court for the summer

holidays and at any future dates for holidays or otherwise without obtaining further leave of the court. Though the matter is, in my judgment, very simple, I have adjourned it into court because there appears to be a certain amount of ignorance, not only among litigants, but also among clerks of courts of summary jurisdiction and registrars of county courts, as to the effect of an adoption order and the proper steps to be taken with regard to adoption orders in respect of children who are the subject of an order of this court.

On Apr. 16, 1947, the applicant—Mrs. Crossley as she then was—obtained a decree of dissolution of her then existing marriage, and on the decree it was ordered that this child, Brian Michael Crossley, as he then was, should remain in the custody of his mother, but should not be removed out of the jurisdiction without the leave of the court. On Dec. 16, 1950, the applicant married Frederick England. On Apr. 11, 1951, the child was adopted by his own mother, Mrs. England as she had become, and her second husband. The adoption by the mother was in accordance with s. 1 (3) of the Adoption Act, 1950, which permits a parent, odd though it may sound, to adopt his or her own child. There were in evidence before me not only the adoption order, but also the original birth certificate of the child and his new birth certificate which correctly describes him as "Brian Michael England" and not "Crossley". That adoption order having been made, it is only necessary to look at one section of the Act to see what effect that order has. Section 10 provides as follows:

"(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parents or guardians of the infant in relation to the future custody, maintenance and education of the infant, including all rights to appoint a guardian and (in England) to consent or give notice of dissent to marriage, shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as if the infant were a child born to the adopter in lawful wedlock; and in respect of the matters aforesaid . . . the infant shall stand to the adopter exclusively in the position of a child born to the adopter in lawful wedlock. (2) In any case where two spouses are the adopters, the spouses shall in respect of the matters aforesaid, and for the purpose of the jurisdiction of any court to make orders as to the custody and maintenance of and right of access to children, stand to each other and to the infant in the same relation as they would have stood if they had been the lawful father and mother of the infant and the infant shall stand to them respectively in the same relation as to a lawful father and mother respectively."

As I read those two sub-sections, it seems to me that, once an adoption order has properly been made, the adopted child ceases to be the child of any previous marriage. That is to say, when Mrs. Crossley—as she is correctly called in this summons, because the summons is in the suit, but Mrs. England as she now is—applies for permission to take Brian Michael, "the child of the marriage", out of the jurisdiction, it is wrong to describe him as "the child of the marriage". He is not. He is the child of Mr. and Mrs. England, and is no longer the child of the marriage between Mr. and Mrs. Crossley. This court, in my judgment, has no power to make the order which is sought. By the same token, though I am not deciding what the Passport Office should or should not do, it seems to me that the Passport Office need not concern themselves at all with any order that was made on the decree in this suit when this boy was Brian Michael Crossley, the child of the marriage between Edith Gertrude Crossley and Victor Henry

Crossley. He is no longer a child of that marriage. He is the lawful child of Frederick England and Edith Gertrude England. That, therefore, disposes of this summons.

I should like to add this, though it is not strictly germane to the present summons. This term there have been before me a number of applications, and I know that at various times there have been many before other judges in this Division, in connection with proposed adoption orders in respect of children with regard to whom there is an order for custody of this court in force. The typical example, and this happens very often, is a case like the present one where a wife divorces her husband, obtains custody of the child or children, thereafter re-marries, and then seeks to have the child or children adopted by herself and her new husband. The view is, apparently, taken by some courts of summary jurisdiction and by some county courts which have jurisdiction in this matter that out of deference to this court the inferior court ought not to proceed to make such an order unless the order of the High Court is first cleared out of the way. That matter has been dealt with by a direction of LORD MERRIMAN, P., and it is in order that the attention of those concerned might be called to that direction that I have adjourned this summons into court. The direction is printed in *RAYDEN ON DIVORCE*, 2nd supp. to 5th ed., p. B 63, and reads as follows:

"Where a person or persons are desirous of adopting a child in respect of whom a custody order has been made in the Divorce Division of the High Court, the application can be dealt with in the ordinary way at a county court or a court of summary jurisdiction notwithstanding the custody order, provided that the requirements of the Adoption of Children Acts are complied with. It is not necessary to obtain the discharge of the custody order before making the application. The adoption order, when made, extinguishes and supersedes the custody order and the child is treated thereafter as the child of the adopter or adopters."

I hope, therefore, though, as I say, it is not immediately germane to the present summons, that in future persons who are seeking to obtain adoption orders in such circumstances as these will be spared the expense and the trouble of having to apply to this court to discharge the custody order when it is plain from the direction of the learned President, with which I respectfully agree, that it is unnecessary to make any such application. If the statutory procedure is complied with, that is an end of a custody order made in proceedings arising out of an entirely different marriage. On this summons, therefore, I make no order.

Solicitors: *Denton, Hall & Burgin* (for the wife).

G.F.L.B.

# COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., BYRNE AND PARKER, J.J.)

Mar. 23, 1953

REG. v. JACKSON

*Criminal Law—Evidence—Corroboration—Failure of prisoner to give evidence.*

It is a misdirection to tell a jury that the failure of the prisoner to go into the witness-box to give evidence can amount to corroboration of the evidence of an accomplice.

**APPEAL** against conviction.

The appellant was convicted before STABLE, J., at Stafford Assizes on Dec. 11, 1952, of being an accessory before the fact to the theft of a quantity of tyres and of receiving the tyres knowing them to be stolen, and he was sentenced to four years' imprisonment. He appealed against his conviction on the ground, *inter alia*, that the judge in his summing-up had misdirected the jury by directing them that they might think that the failure of the appellant to give evidence amounted to corroboration of evidence given against him by accomplices, the thieves of the tyres, to the effect that they had arranged the whole transaction with him. This report deals only with this point.

*Bussé, Q.C., and John Ellison* for the appellant.

*Baker, Q.C., and H. J. Davies* for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. It often happens in relation to charges of receiving stolen goods or of being an accessory to the commission of larceny—cases which are often closely akin to conspiracies—that the evidence which has to be led is that of the persons who themselves were the thieves. That evidence, of course, is open to the comment that it is the evidence of accomplices. The court always directs the jury that they must regard such evidence with great caution and that it is unsafe to act on it unless they can find some corroboration, but that, even though there is no corroboration, they may convict if they are satisfied that the accomplices are telling the truth. Juries are always warned that they ought, if they can, to have corroboration, because that is the only satisfactory way of coming to a decision where the evidence consists of the evidence of accomplices, but the day has long gone by when this court will quash a conviction merely because it has been obtained on the evidence of accomplices, because it is perfectly open to the jury, if they choose, to accept their evidence.

The difficulty that arises here is on the direction that the learned judge gave, because, having pointed out who might be regarded as accomplices and emphasised the danger of acting on their evidence, in commenting on the fact that the appellant had not gone into the witness box to give evidence he said:

"You, members of the jury, will attach just what weight you think right to that, and if you say: 'Well, that, in our view, forms ample corroboration that those thieves were telling the truth. We think he has refrained from going into the witness box because he does not dare, he thinks he will only make matters worse if he does'—if you come to that conclusion—the weight you attach to his silence is entirely a matter for you."

That came just at the end of the learned judge's summing-up and could only have been understood by the jury as meaning that the fact that the appellant had not gone into the witness box might amount to corroboration if they thought fit to treat it as such.

That is not correct. One cannot say, because a prisoner has not gone into the



witness box to give evidence, that that of itself is corroboration of the evidence of accomplices. It is a matter which the jury could very properly take into account and very probably would, but it is not a right direction to give to a jury, and it should be clearly understood that it is wrong in law. However, the jury evidently thought this was an overwhelming case because, after a trial of a day and a half, they were out for exactly five minutes and came back and found the appellant guilty. In view of the circumstances the court thinks that this is a case in which it is bound to apply the proviso to s. 4 (1) of the Criminal Appeal Act, 1907, which says that if, in the opinion of the court, no miscarriage of justice has occurred, the court may dismiss the appeal although it decides the point of law in the appellant's favour. That the appellant here received the tyres and that they were stolen, there was no doubt. The only question was whether he knew they were stolen, and the very defence he was setting up, as indicated by the cross-examination which he instructed his counsel to administer to the witnesses for the prosecution, seems to this court to show in the strongest possible way that he must have known that these goods were stolen. Therefore, although we cannot approve the learned judge's direction to the jury, that they could take the fact that the appellant did not go into the witness box as amounting to corroboration, the case was so clear that the jury, after a proper warning, must have accepted the evidence of the accomplices, and so the court thinks it right to apply the proviso. *Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Gibson & Weldon*, agents for *H. Taylor*, town clerk, Stoke-on-Trent (for the Crown).

T.R.F.B.

### COURT OF APPEAL

(DENNING, MORRIS AND ROMER, L.JJ.)

Mar. 23, 1953

MARELA, LTD. v. MACHOROWSKI

*Rent Restriction—Closing order made in respect of dwelling-house under Public Health (London) Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 50), sched. V, para. 8—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 156 (1) (e).*

The defendant was tenant of a part of certain premises to which the Rent Restrictions Acts applied. Justices, holding that the premises were unfit for human habitation, made a closing order in respect of the whole dwelling-house under the Public Health (London) Act, 1936, sched. V, para. 8. The landlords claimed possession of the premises, contending that s. 156 (1) (e) of the Housing Act, 1936 (which provides that nothing in the Rent Restrictions Acts shall be deemed to prevent possession being obtained of any part of a building by any owner thereof in a case where a closing order is in force in respect thereof) applied so that the defendant was no longer protected by the Rent Acts.

**HELD:** a closing order made under sched. V, para. 8, to the Public Health (London) Act, 1936, in respect of a whole dwelling-house was not a closing order within s. 156 (1) (e) of the Housing Act, 1936, the closing order referred to in that paragraph being a closing order which a local authority is given power to make by s. 12 (1) of the Housing Act, 1936, in respect of part of a building, and, therefore, the closing order made under the Public Health (London) Act, 1936, did not take the premises outside the operation of the Rent Restrictions Acts, and the landlords were not entitled to possession.

**APPEAL** from Shoreditch County Court.

*Spears* for the landlords.

*Chavasse* for the tenant.

**DENNING, L.J.:** This is a claim by Marela, Ltd. against Mrs. Machorowski for possession of rooms at the rear of the ground floor at 86, Brick Lane. The rooms were let by the landlords to the tenant at a rent of 12s. 3d. a week, and the question is whether she is protected by the Rent Restrictions Acts.

On Apr. 2, 1952, justices found that it had been proved that a nuisance existed on the premises No. 86, Brick Lane, in that the roof was not weather-proof, the second floor front bedroom ceiling was damp, and the door leading to the roof was off its hinges and rain was coming in. On proof of those nuisances, the justices held that the premises were unfit for human habitation, and, in pursuance of the Public Health (London) Act, 1936, they prohibited the use of the dwelling-house for human habitation. That order was a closing order, and it is important to notice that it was made under sched. V to the Public Health (London) Act, 1936, in respect of the whole house. It is contended by the landlords that the effect of that closing order is to take the case outside the Rent Restrictions Acts. The Rent Acts prohibit an order for possession being made except in certain circumstances prescribed in sched. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. None of those circumstances exists here, but it is contended on behalf of the landlords that the application of s. 156 of the Housing Act, 1936, takes the case out of the Acts. Section 156 (1) provides that nothing in the Rent Acts shall prevent possession being obtained

"(e) of any part of a building or underground room by any owner thereof in a case where a closing order is in force in respect thereof."

The county court judge held that a closing order had been made in respect of this house, and that, therefore, s. 156 (1) (e) applied to take the case out of the operation of the Rent Acts.

I find myself unable to agree with the judge. It is quite plain, to my mind, that s. 156 (1) (e) of the Act of 1936 refers only to closing orders which are made under s. 12 (1) of the same Act and does not apply to closing orders made under sched. V to the Public Health (London) Act, 1936. Section 156 (1) (e) refers to a closing order

"of any part of a building or underground room",

and so also does s. 12 of that Act; it does not refer to a closing order for a whole house. That is sufficient to determine this case. This closing order was not made in respect of part of a building or underground room under the Housing Act, 1936; it was made in respect of the whole dwelling-house under sched. V to the Public Health (London) Act, 1936. Counsel for the landlords sought to say that by analogy or necessity we ought to hold that a closing order under the Public Health (London) Act, 1936, also takes the case out of the operation of the Rent Acts. He argued that it is absurd that there should be a closing order preventing the use of the house and yet a tenant should still be allowed to occupy it. The answer to that argument is that a closing order under the Public Health (London) Act, 1936, is entirely different from a closing order under the Housing Act, 1936. A closing order under the Public Health (London) Act, 1936, is one of three means of enforcing a nuisance order. Paragraph 8 of sched. V says:

"A nuisance order may be an abatement order, a prohibition order or a closing order, or a combination of such orders."

A closing order under that paragraph is only one method of enforcing requirements as to repair, and it is an order made by the justices to ensure that the work is done. Once the work has been done and the house rendered fit for

habitation, the closing order ceases. On the other hand, a closing order under the Housing Act, 1936, is made by the local authority, to ensure that the premises are not used. It is the counterpart of a demolition order. In cases where a whole house would be demolished, a part of a building will be closed, and it must not be used. The occupants have to move out and the local authority then have to pay the cost of removal incurred by them. There is nothing in the Public Health (London) Act, 1936, providing for defraying the cost of removal. In my opinion, this matter can only be determined under the wording of the Acts of Parliament themselves. Section 156 (1) of the Housing Act, 1936, provides exceptions from the Rent Acts in respect of houses relating to which demolition orders or closing orders have been made under that Act, but not in respect of a closing order made in respect of the Public Health (London) Act, 1936. This appeal should be allowed.

**MORRIS, L.J.:** I am entirely of the same opinion. It is common ground that the premises in question fall within the scope of the Rent Restrictions Acts, and there is nothing in those Acts under which the landlords are entitled to possession. In those circumstances, the landlords turn to s. 156 (1) (e), of the Housing Act, 1936, the words of which permit possession being obtained

"of any part of a building or underground room by any owner thereof where a closing order is in force in respect thereof."

I fully agree with my Lord that those words do not apply to the present case, but refer only to a closing order made under s. 12 of the Housing Act, 1936. In spite of the argument of counsel for the landlords it seems to me that, in the absence of some statutory exclusion of the Rent Acts, those Acts continue to apply and that the landlords are not entitled to possession in this case. It is also of consequence to point out that under sched. V to the Public Health (London) Act, 1936, para. 9,

"A petty sessional court, if satisfied that a dwelling-house in respect of which a closing order is in force has been rendered fit for human habitation, may declare that it is so satisfied and revoke the closing order."

If the defects referred to in the closing order in the present case are remedied, there is no reason why the petty sessional court should not revoke the closing order. I agree that this appeal must be allowed.

**ROMER, L.J.:** I also agree. In my view, the only possible footing on which the landlords could succeed would be by their showing that the case comes within s. 156 (1) (e) of the Housing Act, 1936, and the facts, as I see them, show quite plainly that that paragraph has no application—first, because the closing order which was made was not made under the Housing Act, 1936, at all, but was made under a different statute, the Public Health (London) Act, 1936, and, secondly, because the closing order was made in relation to the whole of the premises No. 86, Brick Lane, whereas s. 156 (1) (e) of the Housing Act, 1936, by its very terms applies only to cases where a closing order is in force in respect of a part of a building. In the face of those two difficulties, it is impossible for the landlords to rely on s. 156 (1) (e), and, inasmuch as there is no other enactment which removes these premises from the general scope of the Rent Restrictions Acts, it necessarily follows that the tenant is entitled to the protection of those Acts, the landlords cannot succeed in their attempt to recover possession, and this appeal must be allowed.

*Appeal allowed.*

Solicitors: *Sidney Nyman & Co.* (for the landlords); *Neil Maclean & Co.* (for the tenant).

R.P.P.

## COURT OF APPEAL

(SINGLETON, DENNING AND ROMER, L.JJ.)

Mar. 24, 1953

WALSH v. OATES

*Right of Way—Way over soil later becoming highway—Order of quarter sessions stopping up highway—Effect of order on private right of way—Highway Act, 1835 (5 and 6 Will. 4, c. 50), s. 91.*

Part of a public highway over which the plaintiff claimed a private right of way was stopped up by an order of quarter sessions made under the Highway Act, 1835, s. 91. In an action brought by the plaintiff for obstruction of his alleged right by the defendant,

**HELD:** the rights of the public over the highway were extinguished by the order of quarter sessions, but a private right of way over the same land remained unaffected thereby, and, therefore, if the plaintiff could establish the existence of a private right before the road became a highway, he was entitled to succeed in his action.

*Wells v. London, Tilbury and Southend Ry. Co.*, (1877) (41 J.P. 452) and *Allen v. Ormond*, (1806) (8 East 4), applied.

*R. v. Wallace*, (1879) (43 J.P. 493), distinguished.

APPEAL by plaintiff from an order of His Honour JUDGE ARCHIBALD made at Halifax County Court and dated Jan. 16, 1953.

The plaintiff was possessed of certain premises known as Whiskam Cottage, Miss Lister's Road, Halifax. In his statement of claim he alleged that Miss Lister's Road was a private road leading from Shibden Hall Road, Halifax, alongside his land and across the defendant's land to public highways on the other side. He further alleged that he and his predecessors in title to Whiskam Cottage had for forty years preceding the commencement of the action enjoyed as of right and without interruption the road known as Miss Lister's Road for the purpose of passing and re-passing on foot and with horses and vehicles, and he claimed the right to do so as a legal easement of way under s. 2 of the Prescription Act, 1832. He also claimed the right of way as having been used by him and his predecessors in title from time immemorial, and by virtue of a grant by a deed made by all necessary parties. He alleged further that in or about August, 1949, the defendant by his servants or agents had commenced to excavate or destroy Miss Lister's Road for the purpose of getting fire-clay or other minerals and had continued so to do, thereby hindering and preventing him from exercising his right of way. He claimed (a) a declaration that he was entitled to his alleged right of way over so much of the road as formed part of or abutted on the defendant's land, (b) an injunction ordering the defendant to reinstate the road where it had been excavated or destroyed by the defendant, and (c) an injunction restraining the defendant from excavating or destroying the road or obstructing or preventing the plaintiff from enjoyment of the road.

The defendant, in his defence, denied the existence of the plaintiff's alleged right of way and said that before an order made by Halifax Quarter Sessions on Jan. 7, 1943, the whole of the road was a public highway, but that by that order part of the road, including the whole of the defendant's section, was stopped up under s. 91 of the Highway Act, 1835.

The learned county court judge gave judgment for the defendant, holding that the order of quarter sessions had the effect of extinguishing the plaintiff's



private right of way (assuming he ever had one) over the part of the road which was stopped up.

*Whitworth* for the plaintiff.

*Rink and C. R. Dean* for the defendant.

**SINGLETON, L.J.**, stated the facts and continued: A writ in this action was issued on Dec. 19, 1949. After the pleadings had been delivered, there was an order dated Nov. 25, 1952, that the action be remitted to the Halifax County Court for trial, and the case came before His Honour JUDGE ARCHIBALD on Jan. 16, 1953. Counsel for the plaintiff referred the judge to certain authorities, and, while he was opening, both learned counsel agreed, as the judge's notes show, that, if the judge took the view that in law the plaintiff's rights over the highway were destroyed when it was closed by the order of quarter sessions, there must be judgment for the defendant. The learned judge considered the authorities, and gave judgment for the defendant. His decision was based on the supposition that the plaintiff could show that he had had a private right of way over Miss Lister's Road and that, at some time after he had acquired that private right of way, Miss Lister's Road had become a highway. It was submitted on behalf of the defendant that, notwithstanding the private right of way, the fact that an order was made by quarter sessions stopping up the highway resulted in the private right of way being extinguished. The order of quarter sessions was made under the Highway Act, 1835, the relevant sections being ss. 84 to 91. The procedure used to be well known at quarter sessions. If the documents were all in order and no one opposed the application, it was a simple matter. If there was opposition, or an appeal as it is called, there was a contest before a jury, and, if it was found that any person would be aggrieved by the order, the application failed. Notices had to be given and justices inspected the road and gave their certificate, and the final stage was the enrolment of that certificate.

The learned county court judge determined that that procedure, which had taken place in this case in 1943, was sufficient to extinguish any private right of way or any private easement which the plaintiff had over the road which became at some time Miss Lister's Road. The editors of *PRATT AND MACKENZIE ON THE LAW OF HIGHWAYS*, 19th ed., p. 16, put the position in this way:

"Where a private right of way already exists, and the public subsequently acquire a right of passage over the same course, the public must take subject to the private right; and a public right of footway may accordingly be limited by a pre-existing private right of carriageway . . . And if an Act of Parliament gives power to extinguish the public right, the private right will not be affected thereby, but will continue to subsist."

In support of that proposition, the learned editors cite *Wells v. London, Tilbury and Southend Ry. Co.* (1), and, in dealing with extinguishment and diversion of highways, point out (*ibid.*, p. 130):

"If any private rights of way existed over land before the dedication thereof to the public, they are not affected by the extinguishment of the public right."

In *Wells v. London, Tilbury and Southend Ry. Co.* (1) the plaintiffs had been entitled from 1855 to a carriageway to property of theirs over a railway by a level crossing. By an Act of Parliament obtained by the company in 1875,

(1) (1877), 41 J.P. 452; 5 Ch.D. 126.

reciting that it was expedient that the rights of way in respect of certain footways which crossed the railway on the level should be extinguished, it was enacted that all rights of way in, over, or affecting the footways numbered 2, 4, 5, 6 and 7 on the deposited plans should be extinguished. No provision for compensation was made. The roadway in question was numbered 5 on the deposited plans, and was thereon marked "roadway and footway", the other being marked simply "footway". It was held, affirming the decision of SIR RICHARD MALINS, V.-C., that on its true construction the Act dealt with public rights of way only and did not take away the plaintiff's private right, and that an injunction restraining the railway company from obstructing the carriage-way had been rightly granted. That case was decided under a private Act of Parliament and is, perhaps, not so useful for the purposes of this appeal as *Allen v. Ormond* (1) where it was said that one who has a grant of an occupation way may declare in case against the owner of the land over which the way leads for obstructing it, although it be proved that the public in general had used the way without denial for the last twelve years. The decision of the court is stated in this way (8 East 6):

"The court said, with respect to the first objection, that where a party has a certain special right of way granted to him, he may rest upon that title, and need not resort to a general right, which may possibly be disputed by conflicting evidence; especially in a case, like the present, of a public right of way growing out of an occupation way."

An order made by quarter sessions for stopping up a highway under the provisions of the Highway Act, 1835, s. 91, is an order made against the public. Section 91 provides that "the proceedings thereupon shall be binding and conclusive on all persons whomsoever". No one can dispute the proceedings, but, in my view, that does not mean that one who has a private right of way is thereby barred for all purposes from exercising that right of way. The order which is made is one for stopping up a highway and it destroys the public right of way.

The learned county court judge had cited to him *Reg. v. Wallace* (2), and, in particular, part of the judgment of SIR ALEXANDER COCKBURN, C.J. (43 J.P. 494) where he said:

"I think looking at the sections of the Act of Parliament more closely there is no foundation for it [the objection] and for the simple reason that as soon as the proceedings have terminated for the substitution of a new road for an old one, the diversion to which the certificate of the magistrates had reference had been established, and hence the old road ceased to be a highway at all."

It seems to me that there the Lord Chief Justice was dealing with the public rights or easements to which the old portion of the road had been subject up to the making of the order, and was saying that thereafter that portion of the highway was unencumbered by any of those easements. He had not in mind the position which arises in the present case. I cannot see that on the bald statement of fact and admission made to the learned judge in this case it can be said that the plaintiff's case was destroyed merely by the fact that an order under the Highway Act, 1835, had been made stopping up this highway qua highway.

It remains to be decided whether or not the plaintiff can establish that at some time Miss Lister's Road was a private road and that before Miss Lister's

(1) (1806), 8 East 4.

(2) (1879), 43 J.P. 493; 4 Q.B.D. 641.

Road became a highway some rights had accrued to him in respect of the way which later became Miss Lister's Road, and for the determination of those questions the case must go back to the learned county court judge.

**DENNING, L.J.:** It is clear law that there may be a private right of way and a public right of way existing along a road at the same time. When an order is made stopping up a highway under the Highway Act, 1835, that extinguishes the public right, but it does not affect the private right. This case must, therefore, go back for it to be determined whether there was or is such a private right.

**ROMER, L.J.:** The Highway Act, 1835, was concerned solely with the rights of the public in relation to the use of highways and was not concerned with private rights, and so I agree that this case should go back for hearing on the points mentioned.

*Appeal allowed.*

Solicitors: *Clutton, Moore & Lavington*, agents for *Ralph C. Yablon & Temple-Milnes*, Bradford (for the plaintiff); *Fletcher, Jones & Ball*, agents for *W. H. Boocock & Son*, Halifax (for the defendant).

R.P.P.

## WINCHESTER ASSIZES

(SLADE, J.)

Mar. 12, 13, 20, 25, 1953

### HOOK v. CUNARD STEAMSHIP CO., LTD.

*False Imprisonment—Merchant ship—Member of crew—Right of master, at common law, to arrest and confine.*

The master of a merchant ship is justified at common law in arresting and confining in a reasonable manner and for a reasonable time any sailor or other person on board his ship only if he has reasonable cause to believe, and if he does in fact believe, that the arrest and confinement are necessary for the preservation of order and discipline, or for the safety of the vessel or persons or property, on board.

On the issue of damages for false imprisonment, *Walter v. Alltools, Ltd.* (1944) (171 L.T. 371), followed.

**ACTION** for damages for false imprisonment.

The plaintiff entered the service of the defendants, the Cunard Steamship Co., Ltd., in 1909. By a contract in writing, dated Apr. 1, 1949, the defendants agreed to employ him as a lounge steward for two years from the date of the contract, and on June 24, 1950, when the defendants' ship, R.M.S. Queen Elizabeth, left Southampton for New York, he was serving as a steward in the first class passenger lounge of the ship. Up to that time his character and reputation were unblemished. Among the first class passengers in the ship were Dr. Greenberg and his wife, their daughter Linda, aged ten years, and their son, aged six years. On the evening of June 25, Captain Cove, the commanding officer of the ship, instructed the staff captain to investigate a complaint by Dr. Greenberg. His daughter, Linda, alleged that an indecent assault had been committed against her in the lounge that evening, and, in the presence of, among others, the staff captain, the chief steward, the master at arms and Dr. Greenberg, she identified the plaintiff as the person responsible,

but no one told the plaintiff at the time what was alleged against him. Dr. Greenberg was about to strike the plaintiff, but the staff officer intervened and told the chief steward that the plaintiff was to work in the pantry for the rest of the voyage away from the passengers. Dr. Greenberg then said that he wanted the plaintiff put under lock and key. The plaintiff was taken away before he could say anything, and was confined for the night in a cabin, with a sentry outside the door. On the same evening, Dr. Greenberg told Captain Cove that, in his opinion, the plaintiff was mentally unbalanced and would be a danger to the other children in the ship, as well as to Linda, if he were left to go about the ship. Dr. Greenberg demanded that the plaintiff should be kept under restraint and said that, if this were not done, he would consider it his duty to inform the parents of other children among the passengers of the facts. He also stated that, when the ship arrived in New York, he would have the plaintiff arrested and prosecuted. On the following morning the plaintiff was brought before the captain. He denied the accusation made against him, and the chief steward told the captain of his long service and good record. There was no evidence in corroboration of Linda's story, and a statement signed by Dr. Greenberg which was before the captain, and which purported to be her account of the incident, was inconsistent with the account which she had given in the presence of the staff captain, which account was taken down at the time by the master at arms and was also before the captain. The captain ordered the plaintiff to be kept under restraint in the isolation hospital for the remainder of the voyage and until after the first class passengers had disembarked at New York. The two doctors of the ship, having examined the plaintiff on the captain's orders, reported that he seemed normal. Early on June 29, the Queen Elizabeth reached New York, the first class passengers completed their disembarkation by 9 a.m., and the plaintiff was set free between 9 and 10 p.m. On the return voyage the plaintiff was given administrative duties in the catering department. There was a large number of child passengers on that voyage. On July 6, after the Queen Elizabeth reached Southampton, the plaintiff was discharged from his employment in the ship, and on Nov. 7, 1950, the defendants dismissed him from their employment.

By the writ and statement of claim the plaintiff claimed damages not only for false imprisonment, but also for breach of contract and wrongful dismissal. Before the action came into court the defendants paid into court the full amount of the claim for damages for breach of contract and wrongful dismissal, and the plaintiff accepted that sum. By their amended defence, the defendants maintained that the arrest and imprisonment of the plaintiff was lawful. After saying that the action was taken on the authority of the master following a complaint to him by Dr. Greenberg, they went on to say:

"The said action was reasonable and proper and in the interest of preserving good order in the ship in that the said complaint appeared to be well-founded, the said Dr. Greenberg threatened to do violence to the plaintiff and expressed his fear that the plaintiff might do violence to the child, the nature and force of the accusation justified the plaintiff being required to submit to medical examination and/or observation and rendered it highly undesirable that he should continue his duties. Further or alternatively the master had reasonable cause to believe and did believe that the said arrest and imprisonment was necessary for the preservation of order in the ship and the safety of child passengers by reason of the matters hereinbefore mentioned and the risk of a repetition of the conduct complained of."



At the hearing of the action, the captain gave the following reasons, *inter alia*, for his action in keeping the plaintiff in confinement: (a) that there might be some truth in Dr. Greenberg's assertion that the plaintiff was mentally unbalanced and might be a danger to the passengers, (b) that, if Dr. Greenberg carried out his threat of informing other passengers, it might create a state of alarm in the ship amongst the passengers and loss of order amongst the ship's company, and (c) that it might be more comfortable for the plaintiff, in view of Dr. Greenberg's threatening attitude toward him. The captain went on to say that, in navigating a big passenger ship with due regard to the safety and comfort of the passengers, he could not ignore the possibility of adverse circumstances arising at any time, and that he had to take steps to see that through them no harm came to his ship or to his passengers. SLADE, J., found that the plaintiff was mild-mannered, disciplined and reliable. In connection with the finding that the plaintiff was not informed of the charge against him before he was put under restraint, the learned judge referred to *Christie v. Leachinsky* (1).

*Skelhorn* for the plaintiff.

*Molony* for the defendants.

SLADE, J., stated the facts, and continued: In the first place, I have to ask myself: In what circumstances does the law recognise the right of the master or anyone deputed by him to imprison someone who is on board the ship which he is commanding when the ship is on the high seas? I am, of course, dealing only with the right at common law, as opposed to the statutory right under the Merchant Shipping Acts in circumstances which do not arise in this case. There is very little authority on the point. In HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 33, p. 43, para. 75, the law is stated in this way:

"The master of a merchant ship is justified at common law in arresting and confining in a reasonable manner and for a reasonable time any sailor or other person on board his ship, if he has reasonable cause to believe that such arrest or confinement is necessary for the preservation of order and discipline or for the safety of the vessel or the persons or property on board."

I think that that statement requires to be amplified, and that, not only should the master of the ship have reasonable cause to believe in the necessity of the confinement for any one of the purposes stated, but he should, in fact, believe that the confinement is necessary for that purpose: that is to say, that the confinement must comply not only with the objective but also with the subjective requirements in that respect.

The word "necessary" or "necessity" is, I think, vital. That requirement derives some support from a direction given to the jury in *Aldworth v. Stewart* (2), which was cited by counsel for the plaintiff. In that case a passenger on board a passenger ship was imprisoned for insolence to the captain, the justification pleaded by the captain being that it was necessary for the due preservation of discipline. CHANNELL, B., in summing-up to the jury, said:

"It was undoubtedly necessary that the captain of a ship should be intrusted with considerable authority, and it was true as a general proposition that the captain had some authority over the passengers as well as over the crew. But this authority was based upon necessity, and was limited to the preservation of necessary discipline and the safety of the

(1) 111 J.P. 224; [1947] 1 All E.R. 567; [1947] A.C. 573.

(2) (1866), 4 F. & F. 957.

ship. It was true that the captain was not bound to wait for actual mutiny, and he might arrest any movements towards it on the part of the passengers or crew. But then there must be some act calculated, in the apprehension of a reasonable man, to interfere with the safety of the ship or the due prosecution of the voyage."

That is the objective test. Counsel for the defendants cited a passage from the judgment in *The Lima* (1), where SIR JOHN NICHOLL said:

"The maritime law and the legislature have always considered this valuable class of persons, the British mariners, as highly claiming encouragement and protection; but, on the other hand, the maintenance of order, discipline, and the authority of the commanding officer on board, are essential to the safety of navigation, and the great commercial interests of the country."

What, therefore, is the authority of the commanding officer on board? In the view which I take of this case it becomes unnecessary for me to decide whether the right, whatever it is, is limited to the master or commanding officer of the ship, or whether he is in any circumstances entitled to delegate it. I will, therefore, apply it to the master of a ship. To justify the imprisonment of the plaintiff, based on the justification as pleaded in this case, I hold that the defendants must prove, in accordance with the standard of proof which arises in a civil action, namely, the preponderance of probability, first, that the master, Captain Cove, had reasonable cause to believe that the arrest and confinement of the plaintiff were necessary for either (a) the preservation of order in the ship, or (b) the safety of one or more of its passengers (I say "one or more" so as to include not only Linda but Dr. and Mrs. Greenberg and the little son), and, secondly, that the master, in fact, believed that the arrest and confinement were necessary for either of those purposes. The parties have agreed in this case that I am to treat the arrest and confinement alleged in the statement of claim as being the single tort of false imprisonment.

Again, it is necessary to underline the word "necessary". The question which I have to decide is not: Did Captain Cove believe the accusation against Hook to be true? The answer to that is, of course, that he did, and that Dr. Greenberg did. Nor is the question: Had he reasonable grounds for believing the accusation to be true? I am prepared to accept that he had. The question is: Had he reasonable grounds for believing that the imprisonment of the plaintiff was necessary either for the preservation of order in the ship or for the safety of one or more of its passengers. That, as I have said, is the objective test. I have no hesitation whatever in arriving at the conclusion that the plaintiff's imprisonment was in no way necessary and that there were no reasonable grounds for believing it to be necessary for either of those purposes. It is true that, on the return voyage, Dr. Greenberg could no longer make the wild threats and the extravagant statements which he had previously made, because he would not be there to make them, but, if there were grounds for believing that the plaintiff was really the sort of ogre that he was painted as being, I cannot see, if he remained at large, why the children should have been any more safe on the return voyage than they were on the outward voyage.

That is sufficient to dispose of the defence, but, as the case may go further, I feel it desirable that I should express my view on the second question, and I find as a fact that neither the master nor the staff captain, in fact, believed that the arrest and confinement of the plaintiff were necessary for either of

(1) (1837), 3 Hag. Adm. 346,

those purposes or at all. I acquit them entirely of any malice in the sense of ill will or spite towards the plaintiff. On the contrary, I am satisfied that they felt considerable concern for him, a trusted servant of so long standing with their company and under a two years contract with the company. But, in spite of their disclaimers, I am satisfied that they did not order the confinement of the plaintiff, and the continuation of the confinement, because they, in fact, believed that it was necessary for any of the purposes which I have mentioned, but that they did it to placate Dr. Greenberg, and, by placating Dr. Greenberg, to avoid what Captain Cove described as "unwelcome publicity". [His LORDSHIP reviewed the evidence in support of his conclusion, and continued:]

No one in this action has ever ventured to suggest that there was any justification for the accusation made by the child, Linda, against the plaintiff, and it is fortunate for the defendants that I, not sitting with a jury, am able to make it clear that there is no vestige of ground, nor has any vestige of ground been suggested by the defendants, for casting the slightest aspersion on the plaintiff's character. I am, therefore, able to vindicate him in this court, and it is not necessary for me to vindicate him by visiting a heavy sum of damages on the defendants for their conduct in this matter as a jury might well have done, that being the only way in which they could have made it clear that that is no stain of any kind on his character. On the issue of damages, I am required by the decision of the Court of Appeal in *Walter v. Alltools, Ltd.* (1) to bear in mind that in an action for false imprisonment, as was said by LAWRENCE, L.J.:

"The general principle . . . is that any evidence which tends to aggravate or mitigate the damage to a man's reputation which flows naturally from his imprisonment must be admissible up to the moment when damages are assessed. A false imprisonment does not merely affect a man's liberty, it also affects his reputation. The damage continues until it is caused to cease by an avowal that the imprisonment was false."

[After reviewing the evidence in regard to the plaintiff's dismissal from the defendants' service, His LORDSHIP assessed the damages to which the plaintiff was entitled in respect of the false imprisonment at the sum of £250.]

*Judgment for the plaintiff.*

Solicitors: *Waller, Chesshire & Co.*, Southampton (for the plaintiff); *Lamport, Bassitt & Hiscock*, Southampton, agents for *Hill, Dickinson & Co.*, Liverpool (for the defendants).

G.F.L.B.

## CARMARTHENSHIRE WINTER ASSIZES

(DEVLIN, J.)

Mar. 6, 31, 1953

## LEWIS v. CARMARTHENSHIRE COUNTY COUNCIL

*School—Negligence of schoolmaster—Child at nursery school—Permitted to run on to highway—Injury to vehicle driver in avoiding child—Liability of education authority.*

A child, aged four years, while at a nursery school, was made ready to go out for a walk and was left with another child in a classroom. The child left the classroom and ran on to the highway, causing the driver of a lorry to swerve violently so that the lorry struck a telegraph post, as a result of which the driver was killed. On a claim by the wife of the driver against the defendants as the education authority,

**HELD:** any person who allowed a young child to stray into a busy street should anticipate, not only that the child might be injured, but also that other users of the road might be injured; in the circumstances the defendants owed a duty of care to the deceased and were in breach of that duty; and, therefore, the plaintiff was entitled to damages.

*Hay (or Bourhill) v. Young* ([1942] 2 All E.R. 396), applied.

**ACTION** for damages for negligence.

On Apr. 19, 1951, between 12.15 and 12.30 p.m. a child named David Morgan, aged four years, was at a nursery school at Ammanford and in the charge of the defendants, the school authority. The nursery school was in a building situated behind the junior school which adjoined College Street, a main street and a busy thoroughfare with plenty of traffic. The mistress in charge of the nursery school took David Morgan and another child into a classroom to get them ready for a walk. She left them in the classroom while she went to the toilet, but when she got outside she found that another child had fallen and cut itself and she was occupied for about ten minutes in attending to this other child. While the mistress was away, the two children left the classroom and David Morgan reached the main street, along which the deceased was driving a lorry. David Morgan ran into the road, putting himself in imminent peril of death or injury, the deceased swerved his lorry violently to avoid him, the lorry hit a telegraph post, and the deceased was killed. The deceased was a married man with three children, aged thirteen, ten and two years. The wife of the deceased now sued the defendants for damages, alleging that the death of her husband was due to the negligence of the defendants or their servants. The defendants denied negligence, and, alternatively, said that, in any event, they owed no duty to the plaintiff's husband.

*G. P. Thomas* for the plaintiff.

*N. G. L. Richards* for the defendants.

*Cur. adv. vult.*

Mar. 31. **DEVLIN, J.**, read the following judgment. In my opinion, on the facts of this case the defendants, to succeed, must provide a satisfactory explanation of how the child came to be on the highway. The school premises front on College Street, and a lane which opens on College Street runs down one side of them. If you stand in College Street facing the school, the lane will be on your right. You will look across the junior school yard to the junior school itself (ages seven to eleven). The infants' school (ages five to seven) and nursery school (ages three to five) are together in another building situated behind the junior school and separated from it by another yard which is used as the infants' playground. The



school premises are separated from the main street and the lane by palings. The main entrance is by a gate off College Street into the junior school yard. You can walk down a passage-way between the junior school buildings and the lane boundary into the infants' yard, and so into the nursery and infants' school, or you can get direct into the infants' yard from the lane by a side gate. The side gate has a latch; the main gate is just pushed to. The infants' and nursery school building has a door in the middle that leads from the infants' yard into a small vestibule. From this a door on the right leads to the infants' classroom, and one on the left to the nursery classroom. On the side of the nursery classroom opposite to this door there is another door leading through a cloakroom into a small yard or play-pen, railed off from the infants' yard, for the nursery school. Thus, the nursery school unit, to which David Morgan belonged, was self-contained both for work and play, and, in the ordinary routine, there can be no danger of the children escaping into the street during school hours. They are brought to and fetched from the vestibule by their mothers or someone from their homes.

The routine for the nursery school is that at 12.15 p.m., after lunch, the children go out into the play-pen until 1 p.m. Two junior children come into the classroom to lay out mattresses on which the nursery children rest after their play. The mistress in charge of the nursery school is Miss Morgan. She is no relation to the child, David Morgan. She does not supervise the children in the play-pen. Another mistress, Miss Rees, does that. It is Miss Morgan's habit, during this period, to go for a walk in the town and to take two of the nursery children with her. David had been hoping for this treat for some time past, and on the morning of this day his mother, when she brought him to school, had asked Miss Morgan that he should have it. Miss Morgan decided to take him and another child of about the same age. So, at 12.15 p.m. the others being out in the play-pen, Miss Morgan got the two children ready in the classroom, and made ready herself. Then she went out to the toilet which is off the play-pen just beyond the cloakroom. As she got out she found that a little child in the play-pen had fallen and cut itself. She took it into the cloakroom and attended to it. This occupied about ten minutes. Then she decided to take it to the headmistress in case a doctor ought to see it. After that she went back into the classroom. There was no one there, and she was crossing the vestibule when she saw David Morgan who had been brought back by a bystander after the accident.

It is one thing to leave children alone in a classroom if the worst that is likely to happen is that they get into a bit of mischief or fall down and hurt themselves, and another thing if there is any chance of their getting out into the street. Should Miss Morgan have anticipated that? There was a latch on the door into the vestibule, but it could be opened by a small child. The outer door into the infants' yard might well have been open. But, Miss Morgan told me, the infants would then be playing in their yard under the supervision of a mistress, and, moreover, the side gate into the lane was usually kept locked. So the children would have to cross not only the infants' yard, but the junior school yard as well, where the children were playing under the supervision of a mistress, and get out by the main gate. The chance of this happening is so slight as to be negligible unless there is carelessness on the part of the two mistresses out in the yards. This evidence, if correct, in my opinion, completely exonerated Miss Morgan herself, but called for an explanation from the other two mistresses. Miss Price, the infants' headmistress, was called and said that the infants were not then in the yard, but were at dinner until 12.30 p.m.,

and were still at dinner when David Morgan was brought back. She said also that the side gate had not been kept locked since the war.

I accept that evidence. I am satisfied that the children must have got out across the empty infants' yard and through the side gate. Miss Morgan's duties gave her no concern with the infants, but they were in the same small building, and I find it difficult to believe that she was ignorant of their dinner-hour or that she could really have thought that the side gate was usually kept locked. In view of this conflict of evidence I wish that I had heard more than I have about the circumstances in which these children were left alone. It is true that the substance of Miss Morgan's story is not challenged. The plaintiff has not at her disposal any material on which she could challenge it. What happened during the relevant period is exclusively within the knowledge of the defendants. Until the trial the plaintiff's advisers have only the sketchy knowledge of the defendants' case that is afforded by answers to interrogatories. In these circumstances, and particularly when the burden lies on the defendants to account for the happening of an untoward event, it does not do to be economical in witnesses and niggardly in the information laid before the court. The omissions in the evidence which have occurred would have been more serious if the defence had been less confined. But I think it emerged quite clearly from Miss Morgan's evidence that the defence was that there was nothing to prevent Miss Morgan from calling to David and the other child to come out into the play-pen, or from asking Miss Rees to keep an eye on them, or from keeping an occasional eye on them herself from the cloakroom, or at least from telling the junior children not to leave them alone. The defence is, I think, that none of these things needed to be done, and is confined to the bare point that there was nothing wrong in leaving the two children alone for ten minutes in the classroom, at any rate when the two juniors were there as well—nothing wrong, that is, in the sense that Miss Morgan could have foreseen that any harm of the sort that was actually done could come of it. Thus, the hurt child is the explanation rather than the justification of Miss Morgan's conduct. Her conduct, it is said, needs no justification, and, on this view, the defence would be just as cogent if she had left the children for some trivial purpose of her own. If she had foreseen the possibility of escape, she could have prevented it, but the possibility did not occur to her, and the cardinal question is, therefore, whether she ought to have anticipated that two four-year olds, left in the position of David and the other child, might leave the classroom and get out into the street.

I have not found the question at all easy to answer. I think this to be a border-line case. Three matters weigh with me. The first is Miss Morgan's own opinion that Miss Rees could not safely attend to the hurt child herself because it would have meant leaving the others alone in the play-pen. That points to a very high standard of care. If Miss Rees could not, from the cloakroom, give adequate supervision to the children in the play-pen, should Miss Morgan have left the children in the classroom quite unsupervised? The second is the significant difference between leaving a child who is happily and safely employed and a child who is expectant and unoccupied. David was dressed up with nowhere to go. No doubt, he was an obedient child, but I doubt whether a sense of obedience or disobedience played much part in his acts. He had not been told to stay where he was, and ten minutes is a long time for a child of four. He might have thought that she had gone out some other way and that he must follow and catch up. He might have opened the door to look for her and been tempted out, fearful lest he might miss his

treat. Thirdly, Miss Morgan had taken on herself personally the particular care of the children, and her duty was to them. It is not, I think, unfair to regard her as, for the time being, their nurse rather than a schoolmistress. I think that constant "minding" is a second nature to those in charge of the very young.

As I am considering now only carelessness and not the extent of the duty, I can ask myself how the matter would have been regarded if the children themselves had been run over. Would a nurse who had for ten minutes turned her back on her charges all ready to go out for a walk have been held free from blame? I confess that, at first, I was tempted to think that this was the sort of thing that might happen to anyone, and that the dereliction, if there was one, was almost too slight to be blameworthy. But that it may happen to anyone is not the decisive test. Even the most careful are occasionally careless. There are few users of the road, for example, who can say that they have never fallen short of the standard of care which the law demands. Fortunately, the results are not often serious. Tragic consequences light up small errors. On the whole, I have come to the conclusion that Miss Morgan ought not to have been unmindful of these children, and that she ought to have foreseen the possibility that they might go out on their own.

The second point in issue, whether any duty was owed to the deceased, gives me no difficulty. I think that any person who allows a young child to stray into a busy street ought to anticipate not only that the child may be injured but that other users of the road may be injured in just the way that the deceased was injured in this case. It is said that there is no precedent for a claim of this sort. But the principle is clear. It is expressed in *Hay (or Bourhill) v. Young* (1), to which I was referred. *Haynes v. Harwood* (2) is also near to the point. In assessing the damages, I have to consider that the plaintiff inherited £900, which were her husband's savings, but she might have expected to have benefited from them in any event. I cannot in this case exclude the possibility of re-marriage. I think, therefore, that the sum which it would be appropriate to award is £3,000. I shall give £200 to each of the older children and £500 to the youngest, and the rest to the wife. Of course, there has to be added to that sum the funeral expenses.

*Order accordingly.*

Solicitors: *J. C. Williams & Roberts*, Carmarthen, agents for *T. Llewellyn Jones*, Neath (for the plaintiff); *Le Brasseur, Davis & Son*, Newport (for the defendants).

G.F.L.B.

(1) [1942] 2 All E.R. 396; [1943] A.C. 92.

(2) [1935] 1 K.B. 146.

## COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Mar. 31, 1953

REG. v. PHILLIPS

*Quarter Sessions—Summary offence—Election by offender of trial by jury—Committal for trial in respect of summary offence—Substitution in indictment of different offence—Summary Jurisdiction Act, 1879 (42 and 43 Vict., c.49), s. 17 (1)—Administration of Justice (Miscellaneous Provisions) Act, 1933 (23 and 24 Geo. 5, c. 36), s. 2 (2) (a) (i).*

The appellant appeared before a court of summary jurisdiction on three charges, each of which related to the making of a false declaration under s. 9 (1) of the Vehicles (Excise) Act, 1949, when applying for a licence in respect of a motor vehicle. Such an offence is a summary offence only, but, as the maximum punishment is six months' imprisonment, a defendant has, by virtue of s. 17 (1) of the Summary Jurisdiction Act, 1879, a right to elect to go for trial by jury. The appellant did so elect, and he was committed for trial on those charges. In the indictment preferred at quarter sessions, however, the prosecution substituted for those charges counts charging the making of false declarations, contrary to s. 5 (b) of the Perjury Act, 1911 (an indictable offence punishable by two years' imprisonment), and the appellant was convicted on those counts.

HELD: that the power conferred by s. 2 (2) (a) (i) of the Administration of Justice (Miscellaneous Provisions) Act, 1933, to substitute other charges which are disclosed on the depositions for the charges in respect of which a prisoner has been committed for trial does not apply where the charge on which the prisoner has been committed for trial is a summary offence and triable on indictment only because the prisoner has elected to go for trial by jury under s. 17 (1) of the Act of 1879; the substitution should not have been made in the present case, and the conviction must be quashed.

## APPEAL against conviction.

The appellant was convicted at Buckinghamshire Quarter Sessions of offences under the Bankruptcy Acts and in respect of these he was sentenced to concurrent terms of twelve months', twelve months' and one month's imprisonment, and no point arose regarding those offences. He was also convicted on three counts of a second indictment, charging him in each case with making a false declaration, contrary to s. 5 (b) of the Perjury Act, 1911 (an indictable offence punishable with two years' imprisonment), and in respect of each of these he was sentenced to four months' imprisonment, the sentences to run concurrently with each other, but consecutively to the sentences for the bankruptcy offences. With regard to the second indictment, the appellant had originally been charged before a court of summary jurisdiction with making three false declarations when applying for licences in respect of a motor vehicle, contrary to s. 9 (1) of the Vehicles (Excise) Act, 1949. Such an offence is a summary offence only, but, as the maximum punishment is six months' imprisonment, a defendant has, by virtue of s. 17 (1) of the Summary Jurisdiction Act, 1879, the right to elect to go for trial by jury. The appellant did so elect, and he was committed for trial on those charges. In the indictment preferred at quarter sessions the prosecution substituted for those charges counts charging the offence of making a false declaration, contrary to s. 5 (b) of the Perjury Act, 1911, contending that those offences were disclosed on the depositions and could be included in the indictment by reason of s. 2 (2) (a) (i) of the Administration of Justice (Miscellaneous Provisions) Act, 1933.

The appellant in person.

E. Daly Lewis for the Crown.



LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before Buckinghamshire Quarter Sessions of a variety of offences relating to bankruptcy matters. There was also a second indictment, in the first count of which the statement of offence was:

"Making a false declaration, contrary to s. 5 (b) of the Perjury Act, 1911."

There were two further counts charging similar offences and the particulars of offence alleged that the appellant:

"In a declaration made under s. 9 (1) of the Vehicles (Excise) Act, 1949, in connection with an application for a licence for a Standard Vanguard motor car, wilfully made a statement, namely, that the said motor car had

When this case came before the court to appeal, the appellant did not get out of the bankruptcy offences. There is no conviction, but the court gave leave to make false declarations.

Section 9 (1) of the Vehicles (Excise)

"... if any person in connection [in respect of a motor vehicle under his knowledge is false or in any manner liable on summary conviction to imprisonment for a term not exceeding

The appellant was charged before the court with offences under this sub-section. As each offence, carries with it a maximum of three months, the appellant had a right under the Jurisdiction Act, 1879, to elect to go to trial on those charges. At the sessions he found that he was not going to be elected to go for trial. Instead, he was charged under s. 5 (b) of the Perjury Act, 1911. This section applies to people who have made a false statement, of course, is an entirely different offence. If the appellant had been charged before the magistrate with the offence under the Vehicles (Excise) Act, 1949, that is to say, the offence charged the appellant when he was before the court under the Perjury Act, the evidence which

has been exactly the same as the evidence they would lead on a charge under s. 9 (1) of the Vehicles (Excise) Act, 1949. Under s. 2 (2), proviso (i), of the Administration of Justice (Miscellaneous Provisions) Act, 1933, an indictment can contain a count for an offence which is disclosed in the depositions, though there has not been any committal for that offence. The prosecution say that, as the depositions showed an offence under the Perjury Act, they were entitled, by reason of that provision, to put forward these charges although the appellant had been committed for trial for the offences under the Vehicles (Excise) Act. This court cannot approve of such a course being taken because, if we did, it would really be making the option which was given to the appellant by s. 17 (1) of the

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Summary Jurisdiction Act, 1879, something in the nature of a trap. Had he chosen to be dealt with by the magistrates, and been convicted by them, he could not afterwards have been prosecuted under s. 5 of the Perjury Act. This court cannot approve of a charge being substituted for the charge on which the prisoner was originally before the magistrates in any case where quarter sessions only get jurisdiction by reason of the prisoner having exercised his option under s. 17 (1) of the Summary Jurisdiction Act, 1879. The conviction on the second indictment is, therefore, quashed.

*Conviction quashed.*

Solicitors: *Horwood & James*, Aylesbury (for the Crown).

T.R.F.B.

NAVY  
AGES

ON

ARKER, JJ.)

OTHERS. *Ex parte* AMES

*tion for committal order—  
order on conditions—Failure  
reasons for failure to comply  
—Money Payments (Jus-  
6), s. 8 (1) (a).*

under a maintenance order  
of £103 4s. 6d., was examined  
re a committal order against  
due under the maintenance  
arrears. Between Mar. 5,  
payments amounting in all to  
suspension of the committal  
had not complied with its  
to be £113 3s., adding to the  
the maintenance order from  
the £39 1s. 6d. paid. They  
a warrant for commitment  
s. 8d. costs). The husband,  
it of habeas corpus.

med as to means on Mar. 5,  
tion, under s. 8 (1) (a) of the  
to make another inquiry in  
the amount owing was due  
and that on Feb. 11, 1953,

they were entitled to issue a warrant of commitment without having summoned the husband to appear before them on that day, but

(ii) that the warrant had been issued for a wrong amount, as the justices ought not to have included the sum of £49 accruing due under the original maintenance order since the date of the committal order, and that on that ground a writ of habeas corpus must issue.

*Reg. v. Miskin Lower Justices. Ex parte Young* (1953) (ante, p. 166), applied.

MOTION for a writ of habeas corpus.

At a court of summary jurisdiction sitting at Swansea on Dec. 15, 1948, a husband was ordered to pay £1 a week for the maintenance of the wife. On Nov. 28, 1951, the wife issued a summons for arrears against the husband. On Mar. 5, 1952, the husband appeared before the justices and was examined

**LORD GODDARD, C.J.**, delivered the following judgment of the court. The appellant was convicted before Buckinghamshire Quarter Sessions of a variety of offences relating to bankruptcy matters. There was also a second indictment, in the first count of which the statement of offence was:

"Making a false declaration, contrary to s. 5 (b) of the Perjury Act, 1911."

There were two further counts charging similar offences and the particulars of offence alleged that the appellant:

"In a declaration made under s. 9 (1) of the Vehicles (Excise) Act, 1949, in connection with an application for a licence for a Standard Vanguard motor car, wilfully made a statement false in a material particular, namely, that the said motor car had not been previously registered."

When this case came before the court by way of application for leave to appeal, the appellant did not get leave to appeal against the convictions of the bankruptcy offences. There is no question about the propriety of those convictions, but the court gave leave to appeal against the convictions of making false declarations.

Section 9 (1) of the Vehicles (Excise) Act, 1949, provides:

" . . . if any person in connection with an application for . . . a licence [in respect of a motor vehicle under the Act] makes a declaration which to his knowledge is false or in any material respect misleading, he shall be liable on summary conviction to a penalty not exceeding £50 or to imprisonment for a term not exceeding six months."

The appellant was charged before a court of summary jurisdiction with offences under this sub-section. As each of the offences, though stated to be a summary offence, carries with it a liability to imprisonment for more than three months, the appellant had a right under s. 17 (1) of the Summary Jurisdiction Act, 1879, to elect to go for trial. He exercised that right and was committed for trial on those charges, but when he came before quarter sessions he found that he was not charged with the offences for which he had elected to go for trial. Instead, he was charged with offences under s. 5 (b) of the Perjury Act, 1911. That statute is, no doubt, wide enough to apply to people who have made false declarations, but such an offence, of course, is an entirely different offence from that with which the appellant had been charged before the magistrates because it is under a different statute. It may well be that the evidence to support the charge under the Perjury Act, 1911, would be the same as the evidence to support the charge under the Vehicles (Excise) Act, 1949, that is to say, if the excise authorities had originally charged the appellant when he was before the magistrates with an offence under the Perjury Act, the evidence which they would have had to lead would have been exactly the same as the evidence they would lead on a charge under s. 9 (1) of the Vehicles (Excise) Act, 1949. Under s. 2 (2), proviso (i), of the Administration of Justice (Miscellaneous Provisions) Act, 1933, an indictment can contain a count for an offence which is disclosed in the depositions, though there has not been any committal for that offence. The prosecution say that, as the depositions showed an offence under the Perjury Act, they were entitled, by reason of that provision, to put forward these charges although the appellant had been committed for trial for the offences under the Vehicles (Excise) Act. This court cannot approve of such a course being taken because, if we did, it would really be making the option which was given to the appellant by s. 17 (1) of the

Summary Jurisdiction Act, 1879, something in the nature of a trap. Had he chosen to be dealt with by the magistrates, and been convicted by them, he could not afterwards have been prosecuted under s. 5 of the Perjury Act. This court cannot approve of a charge being substituted for the charge on which the prisoner was originally before the magistrates in any case where quarter sessions only get jurisdiction by reason of the prisoner having exercised his option under s. 17 (1) of the Summary Jurisdiction Act, 1879. The conviction on the second indictment is, therefore, quashed.

*Conviction quashed.*

Solicitors: *Horwood & James*, Aylesbury (for the Crown).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

REG. v. BEDFORD PRISON (GOVERNOR) AND OTHERS. *Ex parte* AMES

Mar. 30, 1953

*Husband and Wife—Maintenance—Arrears—Application for committal order—Husband examined as to means—Suspension of order on conditions—Failure by husband to comply—No further inquiry as to reasons for failure to comply—Warrant of commitment issued—Habeas corpus—Money Payments (Justices' Procedure) Act, 1935 (25 & 26 Geo. 5, c. 46), s. 8 (1) (a).*

On Mar. 5, 1952, a husband, who was in arrears under a maintenance order made against him on Dec. 15, 1948, to the extent of £103 4s. 6d., was examined by the justices as to means. The justices then made a committal order against him, but suspended it for so long as he paid the sums due under the maintenance order, namely, £1 a week, and 2s. 6d. a week off the arrears. Between Mar. 5, 1952, and Feb. 11, 1953, the husband made payments amounting in all to £39 1s. 6d. On Feb. 11, 1953, the wife applied for the suspension of the committal order to be removed on the ground that the husband had not complied with its terms. The justices found the arrears then due to be £113 3s., adding to the original £103 4s. 6d. the sum of £49 due under the maintenance order from Mar. 5, 1952 to Feb. 11, 1953, and giving credit for the £39 1s. 6d. paid. They did not further examine the husband, but issued a warrant for commitment in the sum of £126 13s. 8d. (£113 3s. plus £13 10s. 8d. costs). The husband, having been arrested and imprisoned, moved for a writ of habeas corpus.

HELD: (i) that, as the husband had been examined as to means on Mar. 5, 1952, the justices were not under the further obligation, under s. 8 (1) (a) of the Money Payments (Justices' Procedure) Act, 1935, to make another inquiry in the husband's presence whether his failure to pay the amount owing was due either to his wilful refusal or to his culpable neglect, and that on Feb. 11, 1953, they were entitled to issue a warrant of commitment without having summoned the husband to appear before them on that day, but

(ii) that the warrant had been issued for a wrong amount, as the justices ought not to have included the sum of £49 accruing due under the original maintenance order since the date of the committal order, and that on that ground a writ of habeas corpus must issue.

*Reg. v. Miskin Lower Justices. Ex parte Young* (1953) (ante, p. 166), applied.

MOTION for a writ of habeas corpus.

At a court of summary jurisdiction sitting at Swansea on Dec. 15, 1948, a husband was ordered to pay £1 a week for the maintenance of the wife. On Nov. 28, 1951, the wife issued a summons for arrears against the husband. On Mar. 5, 1952, the husband appeared before the justices and was examined



as to his means. At that date the arrears due under the order were £103 4s. 6d., and the justices made an order committing the husband to prison for three months, the order to be suspended so long as he paid the amount of the order of Dec. 15, 1948, namely, £1 per week, and 2s. 6d. per week off the arrears. Between Mar. 5, 1952, and Feb. 11, 1953, the husband made thirty-three payments totalling £39 1s. 6d. On Feb. 11, 1953, the wife applied to the justices for the removal of the suspension of the committal order, and the justices, being of the opinion that it was not necessary a second time to examine the husband as to his means, granted the application, and the husband was committed to Bedford Prison. The justices found the arrears then due to be £113 3s., being £103 4s. 6d. due at Mar. 5, 1952, plus £49 due under the original maintenance order between Mar. 5, 1952, and Feb. 11, 1953, less £39 1s. 6d. paid between those dates. The warrant for commitment included court and other costs, namely, £13 10s. 8d., making a total sum due of £126 13s. 8d. The husband now applied for a writ of habeas corpus.

*T. H. K. Berry* for the husband.

*Sheen* for the wife.

*R. J. Parker* for the governor of Bedford Prison.

*F. E. Jones* for the justices.

**LORD GODDARD, C.J.:** In this case, on not very full information as to the facts, the court gave leave to move for a writ of habeas corpus. The application was by the husband who had been committed to prison by the Swansea justices for his default in making payments under a maintenance order. The circumstances seem to show that on Mar. 5, 1952, the justices, who had the husband before them, made an order that he was to pay the arrears, which at that time were £103 4s. 6d., and they suspended the operation of the committal order which they then ordered, provided that he paid the £1 a week under the original maintenance order and 2s. 6d. a week off the arrears. Between Mar. 5, 1952, and Feb. 11, 1953, he made payments totalling in all £39 1s. 6d., and those payments, in accordance with the decision of this court in *Reg. v. Miskin Lower JJ. Ex p. Young* (1), must go in the first instance, unless they are appropriated otherwise, to the payment of the arrears. As, on Feb. 11, 1953, the husband was in default in making further payments, an application was made to the justices for the removal of the suspension of the committal order, and the justices removed the suspension. The warrant was, accordingly, placed in the hands of the police for execution, and he was taken in execution and lodged in Bedford gaol.

The point that was made on his behalf was that his committal was irregular because by s. 8 (1) (a) of the Money Payments (Justices Procedure) Act, 1935, it is provided that on an application to commit an inquiry must be made in the defendant's presence as to whether his failure to pay the sum due was owing either to his wilful refusal or to his culpable neglect, and, counsel says, on Feb. 11, 1953, no such inquiry was held. The court, however, thinks that the justices had power to issue the warrant on Feb. 11, 1953, because the husband had not complied with the terms on which the issue of the warrant had been suspended. He had been examined by the justices on Mar. 5, 1952, and the examination had taken place in his presence. The justices ordered that he should be committed to prison for three months, the order to be suspended as long as he paid the sum of £1 2s. 6d. a week, namely, £1 under the original order and 2s. 6d. off the arrears. He failed to pay that sum, and, therefore,

(1) ante p. 166; [1953] 1 All E.R. 495.

there was no reason why the warrant should not issue and he should not be lodged in prison.

The difficulty is that the warrant was for a wrong amount. The amount which was found due on Feb. 11, 1953, was £113 3s. with £13 10s. 8d. which was owing for costs, so that together there was found due £126 13s. 8d., but the justices ought not to have included £49 which was owing, not for arrears, but under the original maintenance order. This makes a total sum due of £77 13s. 8d., and, as the governor of the prison was ordered to hold this man for three months unless he earlier paid the sum of £126 13s. 8d., it follows, I regret to say, that the warrant is bad and we must discharge it.

BYRNE, J.: I agree.

PARKER, J.: I also agree.

*Writ issued.*

Solicitors: *Field, Roscoe & Co.*, agents for *C. C. Bell & Son*, Bedford (for the husband); *John T. Lewis & Woods*, agents for *W. G. Christians & Sons*, Swansea (for the wife); *Treasury Solicitor* (for the governor of Bedford Prison); *T. D. Jones & Co.*, agents for *Edward Harris & Son*, Swansea (for the justices).

T.R.F.B.

## COURT OF APPEAL

(SIR RAYMOND EVERSLED, M.R., JENKINS AND HODSON, L.JJ.)

Mar. 27, 1953

LESLIE MAURICE & CO., LTD. v. WILLESDEN CORPORATION

*Housing—House unfit for human habitation—Notice to execute works—Reasonable expense—Material date for consideration—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 9 (1) (3), Middlesex County Council Act, 1944 (7 and 8 Geo. 6, c. xxi), s. 260 (1) (2).*

On June 27, 1952, the local authority served a notice on the agents of the lessee of a house in Kilburn, in the county of Middlesex, requiring them, under s. 9 (1) of the Housing Act, 1936, and s. 260 of the Middlesex County Council Act, 1944, to execute certain works which would, in the opinion of the authority, render the house fit for human habitation. The agents appealed to the county court against the notice under s. 15 (1) of the Act of 1936 on the ground that (i) the estimated cost of the works necessary to render the house fit for human habitation did not constitute a reasonable expense having regard to the value of the house after the completion of the works; (ii) that their principal was a lessee under a lease which had only thirty-one years to run and that he had spent an average of £58 a year on repairs and maintenance for the preceding three years, which facts had to be taken into consideration under s. 260 (2) (a) and (c) of the Middlesex County Council Act, 1944; (iii) that the notice was incorrect in form. At the date of the notice the lessee was the lessee of the house in question, but on Aug. 21, 1952, he purchased the freehold reversion of the house, the sale and conveyance being completed on Oct. 30, 1952. The hearing of the appeal was concluded on Dec. 1, 1952. The county court judge estimated the costs of works at £350, and found that, on the basis of the value of the house under s. 9 (3) of the Act of 1936, those costs were not unreasonable, having regard to the value the house would have after the repairs had been done, but, having regard to the length of the unexpired period of the

lease, under s. 260 (2) (a) of the Act of 1944 the expenditure of £350 could not be reasonably justified by the value of the residue of the term to the occupier when it was spent. He allowed the appeal and quashed the notice, and the local authority appealed to the Court of Appeal.

**HELD:** the material date for the consideration of all the circumstances relating to the reasonableness of estimated costs of works required by a notice under s. 9 (1) of the Housing Act, 1936, was the date when the case was heard; in the present case at that date the occupier had become the owner of the freehold of the house, and, therefore, the special defence of s. 260 (2) (a) was not longer available to him; and as the county court judge found the estimated costs reasonable in the case of a freeholder the appeal must be allowed and the validity of the notice of June 27, 1952, restored.

**APPEAL** by Willesden Corporation against an order dated Jan. 16, 1953, made by His Honour JUDGE SIR HENRY BRAUND at Willesden County Court.

Leslie Maurice & Co., Ltd. (the "lessees' agents") were the managing agents for Connaught Estates, Ltd., the holders of the remainder of a ninety-nine years' lease, dated Sept. 25, 1884, of No. 39, Chaplin Road, Willesden. A notice, dated June 27, 1952, was served under the Housing Act, 1936, s. 9 (1), by the town clerk to the Willesden Corporation on the lessees' agents as "the person having control of the house" stating (i) that the corporation (acting by the council) was satisfied that the house was unfit for human habitation in certain respects; (ii) that the council was not satisfied that it was incapable at reasonable expense of being rendered fit for human habitation; (iii) that, in pursuance of s. 9 (1) of the Housing Act, 1936 and s. 260 of the Middlesex County Council Act, 1944, the council required the execution of certain works, set out in a schedule, which would, in the opinion of the council, render the house fit for human habitation. On July 14, 1952, the lessees' agents appealed to the county court under s. 15 (1) of the Act of 1936, stating, as the grounds of appeal, that the work ordered could not be carried out at a reasonable expense having regard to (a) the estimated cost of the work and the value which it was estimated the house would have when the work was completed, (b) the length of the lease, (c) the expenditure incurred in repairs during the three years preceding the date of the notice, and (d) the neglect of the tenant, and they also said that the notice was incorrect in form and that they were not the persons "having control of the house" within s. 9 (1). On Aug. 21, 1952, Connaught Estates, Ltd., entered into a contract for the purchase of the freehold reversion to the house. On Oct. 28, 1952, the appeal came before the county court judge, and evidence was given that Connaught Estates, Ltd., were negotiating for the purchase of the freehold, and that, although the contract had been signed, the date for completion was not known. The hearing was adjourned. On Oct. 30, 1952, the sale of the freehold to Connaught Estates, Ltd., was completed. On Dec. 1, 1951, the hearing of the appeal was concluded. The learned judge found that the cost of the work to be done would be £350, that this was a reasonable expense within s. 9 (3) of the Housing Act, 1936, having regard to the value of the house as a freehold, but that, considering the house to be a leasehold held under a lease with only thirty-one years to run, the sum of £350 was not a reasonable expense, and, as the notice of June 27, 1952, required the work to be done under both the Housing Act, 1936, and the private Act of 1944 without discrimination, the considerations under s. 260 (2) of the Act of 1944, which included regard being had, in the case of leasehold property, to the unexpired period of the lease, should be applied to all the required work. The learned judge, therefore, quashed the order, and the local authority appealed.

*Heathcote-Williams, Q.C.*, and *N. R. King* for the local authority.

*John Stephenson* for the agents of the lessees.

**SIR RAYMOND EVERSLED, M.R.:** By s. 9 of the Housing Act, 1936, it is provided:

"(1) Where a local authority . . . are satisfied that any house . . . is in any respect unfit for human habitation, they shall, unless they are satisfied that it is not capable at a reasonable expense of being rendered so fit, serve upon the person having control of the house a notice requiring him, within such reasonable time . . . as may be specified in the notice, to execute the works specified in the notice and stating that, in the opinion of the authority, those works will render the house fit for human habitation . . . (3) In determining for the purposes of this Part of this Act whether a house can be rendered fit for human habitation at a reasonable expense, regard shall be had to the estimated cost of the works necessary to render it so fit and the value which it is estimated that the house will have when the works are completed."

In the event, which is not this case, of the local authority not being satisfied that it is capable at a reasonable expense of being rendered so fit, then certain other provisions of the Act operate. The person described as "the person having control of the house" is defined by s. 9 (4) as being the person who receives the rackrent of the house, whether on his own account or as agent, or who would so receive it if the house were let at a rackrent. For the purposes of this appeal, there is no question that the agents of the lessees of the house in question satisfy the requirements of the definition and are "the person having control" of the premises in suit.

If the matter rested solely on this Act, it is, I think, clear from the terms of s. 9 (3) that the question for determination, namely, whether the house can be rendered fit for human habitation at a reasonable expense, is one which has to be determined in what has been called an objective way, that is, without regard to any particular circumstances affecting the person who is in control of the premises and the interest which he has. But the matter does not rest on that section alone, for we are concerned in this case with certain premises at No. 39, Chaplin Road, N.W.2, which are situate within the county of Middlesex, so that to them the Middlesex County Council Act, 1944, also applies. Section 260 (1) of that Act reads:

"For the purposes of Part II of the Housing Act 1936 [Part II comprehends s. 9] any dwelling-house . . . the person having control of which fails to keep such dwelling-house sufficiently repaired and painted and the interior surface of the walls thereof sufficiently papered or distempered with washable distemper of a suitable quality so as to prevent the dilapidation thereof and so as to secure reasonable amenities for the occupier or occupiers shall be deemed to be a house not in all respects fit for human habitation and the powers of the local authority under the said Part II shall apply in respect of such dwelling-house accordingly."

The effect of that sub-section appears to be that as regards a house in Middlesex, whatever otherwise might be thought to be the effect of its condition, if there has been a failure to maintain it in the way which that sub-section indicates, it is treated as a house not fit for human habitation, with the consequence, first, that the local authority is bound, if it is not satisfied that it is incapable of being rendered fit at reasonable expense, to serve a notice under s. 9 (1) of the Act of 1936, and, further, that in that notice they must state their opinion that the works which the notice specifies will render the house fit for human habitation. Section 260 (2) provides:



"On an appeal to the county court by the person having control of a dwelling-house upon whom the local authority have served notice under s. 9 of the Housing Act 1936 in consequence of his failure to comply with the provisions of this section the county court judge shall take into consideration . . ."

four items, one being the length of the unexpired portion of the lease if the person on whom the notice is served is a lessee or agent for a lessee. It will be noticed that s. 260 does not itself give any new or distinct power to a local authority to serve a notice. Section 9 of the Act of 1936, as I follow it, works automatically, given the state of facts which is deemed to constitute a want of fitness for human habitation under s. 260 (1) of the Middlesex Act, but it must be added that, if for any reason it appears that the grounds on which the notice is served are referable to s. 260 (1) of the Middlesex Act, the county court judge, if there be an appeal to him in accordance with the provisions of s. 15 (1) of the Act of 1936, must take into consideration these other matters which are not purely objective to the premises, but relate to the particular circumstances of the lessee or other person on whom the notice is served.

In the present case the local authority served a notice on the agents of the lessees the substance of which was this:

"Take Notice: (i) That the corporation of Willesden (acting by the council and hereinafter referred to as 'the council') are satisfied that the above mentioned house is unfit for human habitation in certain respects; (ii) That the council are not satisfied that it is incapable at reasonable expense of being rendered fit for human habitation; (iii) That in pursuance of s. 9 (1) of the Housing Act, 1936, and s. 260 of the Middlesex County Council Act, 1944, the council require you within a period of forty-two days ending on Aug. 8, 1952, to execute the following works, which will in the opinion of the council render the house fit for human habitation, namely:—[as specified on the attached schedule]."

There then follow a number of items which may, I think, fairly be described as similar to the specified items commonly seen in a notice of dilapidations. I observe that the form of notice has paid close attention to the obligations imposed on the local authority by s. 9 of the Act of 1936. There is no power to serve notice save under s. 9, but it will be observed that in the third paragraph of the notice there is a specific reference to s. 260 of the Middlesex Act.

It is plain that, at any rate to a very large extent, it would be virtually impossible to sever the works called for under s. 260 of the Middlesex Act from the rest of what was required to be done. Take the example, which I mentioned during the argument, of the landing and staircase. The first paragraph is:

"Examine the ceiling and take down all broken or loose plaster; re-plaster to a smooth even surface; cut out and stop all cracks and prepare, line and whiten the ceiling. Strip, cleanse, stop and either re-paper or colour-wash the walls."

Save that some part of the work specified is in its nature decorative, what I have read seems to me to cover work which could not, or, at any rate, might not, be properly referable exclusively to s. 260, and the same is true substantially as to the whole document. In the county court, the learned judge spent some time in considering whether this notice, by failing to distinguish in the schedule that part of the work which was attributable exclusively to the Middlesex Act from the rest, was defective or deceptive or both. He found it unnecessary to express a final conclusion on that matter, because, treating himself as able

and bound (and I think in this respect he was right) to take into consideration, as regards the whole of the work specified, all the matters indicated in s. 260 (2), or such of them as the agents of the lessees here relied on, he came to the conclusion that it was not reasonable to spend the money that would have to be spent in making this house fit for human habitation, and so he made an order quashing the order which the local authority had made for doing the work.

In this court, the first point taken on behalf of the local authority was, as I have followed it, that the county court judge should have limited his consideration of the matters which are mentioned in s. 260 (2) of the Middlesex Act to such of the works required to be done as were exclusively related to failure to comply with that Act, and that the judge should have found, either on his own initiative or (I gather) on the application of the lessees' agents, which were those items. Alternatively, the local authority went the length of saying that none of the items in the schedule was shown to have been attributable to any defect arising under the Middlesex Act, and, therefore, these defences should have been wholly disregarded. I qualified my statement of the point by the words "as I have followed it", for I am exceedingly doubtful if I have. If I have failed to understand it, I concede that it is my fault, but the point, I regret to say, remains substantially incomprehensible to me. The local authority served a notice in which they called on the lessees' agents, the persons having control, to do a certain quantity of work. They required them to do that in pursuance of both the Act of 1936 and the Middlesex Act. Evidence was before the county court judge that at any rate some of what they were called on to do was in the nature of decorative repair, *prima facie* falling within the Middlesex Act. No attempt was made to challenge that evidence in cross-examination. No attempt was made by the local authority to suggest that some part of this work or the whole of it had nothing to do with s. 260. Nor, indeed, could they do so, for they had by their notice in effect stated that for the whole of the work they relied on both the Act of 1936 and the Middlesex Act indifferently.

In my judgment, on this form of proceeding the lessees' agents were entitled to raise all the defences open to them under s. 260 (2) in respect of the whole of the claim for the whole of the requirements. Alternatively, if it is said that the judge should have found that none or some only of the works was or were attributable to s. 260, there was, in my judgment, no evidence on which he could so find. I, therefore, reject this argument on the part of the local authority. I think the short answer to it is that, on the matter as it was constituted by the authority's own notice, all the defences available under s. 260 (2) were available to the lessees' agents for the whole of the required works. I repeat that I have a fear that I may have failed to apprehend some nicety in the argument and not have done justice to it. I, therefore, express my view with this qualification, that in the circumstances it is not necessary to express a final and definite opinion on it, since, I think (for reasons which I will approach in a minute), that the local authority is entitled to succeed on other grounds.

It will be convenient here to deal with another matter which counsel for the lessees' agents raised, namely, that, on the face of it, this notice was bad, a point which attracted the county court judge, though he has not finally expressed a conclusion on it. Again, I am not sure that I apprehend this point either. I have already stated that the effect of the Middlesex Act seems to me to be that, given a certain state of facts, Middlesex houses are deemed to be unfit for human habitation and thereon the local authority is bound to serve a notice under the Act of 1936. If they serve a notice alleging that the

house is unfit for human habitation and calling on the person in control to do specified works, and leave it at that, the notice on the face of it would appear to me to be good, though it may be open to the challenge that it is not then apparent whether the local authority is relying on any failure to comply with the Middlesex Act, and, therefore, the person served would be left in doubt whether he could, or to what extent he could, rely on what I will call the special defences under that Act. Another kind of case may be easily imagined, where, apart from failure to comply with s. 260, there was no ground, or no ground which seemed sufficiently convincing to the local authority, for asserting that a house was unfit for human habitation. In such a case, if the sole point taken was that there was failure to comply with the requirements relating to amenity, it would obviously be (to say the least) highly desirable, and might otherwise be deceptive, so to state on the face of the notice, and certainly it would be desirable to avoid serving a notice which referred on the back of it, in printed language, only to the sections of the Act of 1936. But, whatever might be the circumstances in other cases, it seems to me that in the present case the local authority, I assume rightly and it seems to me obviously fairly, said in terms: "All these repairs which we call on you to do we require by virtue of the Acts of 1936 and 1944 indifferently". The only practical effect is that the whole of the special defences were rendered available to the person having control for the whole of the subject-matter of the schedule. That being the form of the notice, it seems to me that there can be no quarrel with it. It was, in my judgment, a compliance with the statutory requirement and it was in no respect deceptive. With all respect, therefore, to the learned county court judge, I am unable to share the misgivings he felt as regards this notice. If the authority were trying to exclude the special defences from some particular matter in the schedule, there might be an objection that they should have made that point clear on the notice. The answer is, that, that not having been done and s. 260 having been applied indifferently to everything, the special defences were open on everything.

I come to the remaining point, which is curious and one which I have found, I confess, rather troublesome. At the date when the notice was served on the lessees' agents, namely, on June 27, 1952, their principals, who, I understand, are Connaught Estates, Ltd., held only an unexpired period of some thirty-one years of a term of years in the premises. In August, 1952, Connaught Estates, Ltd., agreed to buy the freehold reversion, and on Aug. 21, 1952, a binding contract was entered into between the vendor and Connaught Estates, Ltd., the sale and conveyance of the freehold reversion being completed on Oct. 30, 1952. The agents' appeal first came before the county court judge on Oct. 28, after the date of the contract but before that of completion. The hearing was resumed on Dec. 1, 1952, when indubitably the interest of Connaught Estates, Ltd. was no longer that of lessees, but was that of absolute freehold owners. The question of merger is irrelevant. I assume the lease did merge, but, whether it did or whether it did not, once they had acquired an absolute contractual right to the freehold reversion, the lease ceased to be a relevant consideration. I gather that there was no concealment in this respect from the county court judge, but, nevertheless, he dealt with the case on the footing that Connaught Estates, Ltd., remained lessees with a term of thirty-one years left to run.

What is the date on which the county court judge, as enjoined by s. 260 (2) of the Middlesex Act, is to take into consideration what I have called the special defences? It is said by counsel for the agents with force that the right answer

is the date on which the person having control of the house is served and that subsequent changes in title and so on do not matter. I have come to the conclusion that that submission ought to be rejected. The county court judge was not determining some particular question of fact in the ordinary sense, as (for example) whether a forfeiture had been incurred at a particular date. What he had to consider was a matter which has many counterparts in other branches of the law—whether something or another was “reasonable”—in this case whether the house could be rendered fit for human habitation at a reasonable expense. If a judge has to consider reasonableness, *prima facie* it would appear to me that he should consider all the relevant circumstances at the date when he hears the case. I think that in the present instance there are other grounds supporting that view—for example, the second special defence (though it has no relevance in the present case) is expressed to be “the period for which the dwelling-house is likely to continue occupied”. The next is “the expenditure incurred by the person having control of the house during the preceding three years”. The last is “whether the condition of the dwelling-house is or is not due to the wilful default or neglect of the tenant”. If those are added to the first of the special considerations, which is the length of the unexpired period of the lease, the general impression left on my mind is that the right time to consider all these things is when the judge has to make up his mind: “Aye or no, can this house now, when I am going to make an order, be put into a state fit for human habitation at reasonable expense?” One example was given. Supposing some particular calamity fell on the house between the date of the notice and the date of the hearing, or suppose there was some change of tenant, so that one who had been in the past scrupulous was replaced by one who was not scrupulous in looking after the premises. In those circumstances, when should the matter be considered? I think, in the absence of any other guide in either Act, that here, as in (for example) rent restriction cases, the standard of reasonableness is left to the county court judge to determine on all the facts as he finds them at the date when he hears the case.

At the date when the county court judge finally heard this case—indeed, on both dates—the length of the lease had become irrelevant, but it is clear to my mind that it was solely the fact that there were only thirty-one years and no more left of this lease which caused the judge to conclude adversely to the local authority. In a long and careful judgment he first considered the figures of income and outgoings and he showed that, given that the person having control of the house was the freeholder, there should be a profit of £50 a year, or a little less, shown in the foreseeable or immediately foreseeable future by excess of rents recoverable over the necessary expenditures, including a sum which he allocated towards repairs. He said, in effect, as I follow the judgment, that to spend £350 (which is what he found would have to be spent to comply with this notice) to produce that result would be a reasonable thing to do, but he then took the comparable figures on the basis that the interest of the person having control was merely a term of thirty-one years. In that event, when allowance had been made for amortisation and so forth, all the lessees would get out of it would be, at best, £16 a year, which he held to be so meagre a return, to use his own language, as to lead him to the conclusion that the expenditure of the money would not be reasonable in the circumstances.

Looking at the case as a whole, the right and just answer is that the order made by the learned judge ought to be set aside because at the relevant date,



namely, when he heard the matter, Connaught Estates, Ltd., were absolute freehold owners, and, accordingly, the notice of June 27, 1952, which was quashed, should resume its validity and effect.

JENKINS, L.J.: I agree.

HODSON, L.J.: I also agree.

*Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *R. S. Forster*, town clerk, Kilburn (for the local authority); *A. Rawlence* (for the lessees' agents).

F.G.

### COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., BRYNE AND PARKER, JJ.)

Mar. 24, 30, 1953

REG. v. BASS

*Criminal Law—Evidence—Confession—Prisoner in custody—No caution administered—Direction to jury—Judges' Rules, r. 3.*

*Criminal Law—Evidence—Police officer—Note book—Denial of collaboration—Refusal by judge to allow jury to inspect note book.*

On the trial of the appellant on a charge of shopbreaking and larceny, the only evidence against him was that of a confession made to two police officers at a police station. No caution had been administered to the appellant, and the interrogation took place in a room with the door closed and the officers admitted that they would have prevented the appellant from leaving the room if he had desired to do so. The judge, taking the view that the appellant was not in custody at the material time, and being of the opinion that no threat or inducement had been made by either officer, admitted the confession. In his summing-up he told the jury that they must be satisfied that the confession was genuine before they accepted it, and that it was for them to decide whether the officers had threatened the appellant or not.

HELD: that the appellant was in custody at the time of the confession, and, as no caution had been administered to him, the confession had been obtained in contravention of r. 3 of the Judges' Rules and it would have been open to the judge, in the exercise of his discretion, to have excluded it, but, as he had not exercised his discretion in that respect and had not specifically directed the jury that, before accepting the confession, they must be satisfied that it was made voluntarily, the conviction must be quashed.

In giving evidence at the trial both police officers referred to records of the aforementioned confession in their respective notebooks. The records had been made at different times, and, though they were almost identical, the officers denied that there had been any collaboration in making them. Counsel for the appellant asked that the jury should be allowed to see the note books, but the judge declined to allow this.

HELD: that, in view of the vital importance of the credibility of the two officers, the jury should have been allowed to examine the notebooks.

APPEAL against conviction.

The appellant was convicted at the County of London Sessions before the Deputy-Chairman, of shopbreaking and larceny, and was sentenced to twelve months' imprisonment.

The evidence for the prosecution against the appellant consisted almost entirely of a confession made by the appellant at a police station in the presence of two police officers. The appellant's premises had been searched under a search warrant by these and other officers and nothing of an incriminating nature had been found. Some days later the officers left a message at the appellant's house asking him to go to the police station. When he arrived there he was questioned by the officers for three-quarters of an hour without any caution being

administered. The questioning took place in a room with the door closed and the officers agreed that they would have prevented the appellant from leaving the room if he had desired to do so. The appellant then made the confession, which was recorded by the two police officers in their notebooks, in one case directly after the appellant had been charged, and in the other case about an hour later. The records were almost identical. At the trial the suggestion was made by the defence that the confession had been extracted by threats on the part of the police officers, and that there had been a contravention of rule 3 of the Judges' Rules by reason of the appellant having been questioned when he was in custody without any caution having been administered. The deputy-chairman was of opinion that the appellant was not in custody at the time and that, accordingly, there had been no contravention of the Judges' Rules, and, further, that there had been no threat on the part of either officer. He admitted the confession, and in his summing-up told the jury that, before accepting it, they must be satisfied that it was genuine and that it was for them to decide whether there had been any threat on the part of the police. It was suggested to the officers by counsel for the appellant when cross-examining them that the notes in their notebooks recording the confession had been made in collaboration, but this was denied by the officers, Counsel then requested that the jury should be allowed to see the notebooks, but the deputy-chairman refused to accede to this request.

Rule (3) of the Judges' Rules states:

"Persons in custody should not be questioned without the usual caution being first administered."

*F. P. Crowder* for the appellant.

*Sir John Cameron* for the Crown.

*Cur. adv. vult.*

Mar. 30. **BYRNE, J.**, read the following judgment of the court. The court has already intimated that this appeal is allowed and the conviction quashed, and we now proceed to give our reasons.

The appellant was convicted at the London Sessions on an indictment in which he and two other men, who both pleaded Guilty, were charged with breaking and entering a shop and stealing a quantity of tea, cigarettes and chocolate. The case against the appellant rested entirely on answers he made to questions put to him by two police officers who interrogated him for about three-quarters of an hour at Paddington police station. Those answers amounted to a confession of guilt, but after the officers had been cross-examined and the appellant had given evidence as to the circumstances in which they were made, the learned deputy chairman held that they were admissible and that there was nothing improper in the way they had been obtained. A week before the interrogation at the police station, the two officers and two other officers armed with a search warrant had, in the presence of the appellant, searched his house, but had found nothing to connect him with the theft. Some days later, however, in consequence of information which they had received from the appellant's co-defendants and a police informer, the two officers decided to interview the appellant, and it was in response to a message left at his house that the appellant called at Paddington police station and the interview took place.

The appellant, with the leave of the court, appealed against conviction on two grounds. The first ground is that the appellant's answers to the police officers should not have been admitted in evidence, first, because the circumstances in which they were obtained amounted to a contravention of r. (3) of the Judges' Rules, and, secondly, because they were made, not voluntarily, but as the result of a threat to withhold bail. The second ground of appeal is that the learned

deputy chairman was wrong in refusing to allow the jury to see the officers' notebooks. The interview took place in the C.I.D. room at the police station.

Counsel for the appellant, who appeared also in the court below, asked Detective-Constable Butler:

"Q.—The truth of the matter was this, was it not, that you had no intention of cautioning him until you had wrung from him the admission you required? A.—I did not caution him until such time as he admitted the offence. Q.—Exactly. It took you three-quarters of an hour in one room with the door shut? A.—Yes. We may have discussed something else as well. Q.—Would you agree that, to all intents and purposes, he was under arrest? A.—No. Q.—If he had tried to go, would you have prevented it? A.—He did not try to go. Q.—If he had, you would have done? A.—Yes. Q.—If he had refused to go to the C.I.D. room, you would have taken him there by force? A.—Yes."

There can be no doubt, having regard to that evidence, that the appellant was in custody, that he was questioned without being cautioned, and thus that there was a breach of r. (3) of the Judges' Rules. If the deputy chairman had held—as we think he should have done—that the statement was taken in contravention of the Judges' Rules, it would have been open to him in his discretion to have refused to admit it. On this matter he did not exercise any discretion because, erroneously as we think, he considered the rules had not been contravened.

That, however, is not an end of the matter, for this court has said on many occasions that the Judges' Rules have not the force of law, but are administrative directions for the guidance of the police authorities. That means that, if the rules are not complied with, the presiding judge may reject evidence obtained in contravention of them. If, however, as *Rex v. Voisin* (1) shows, a statement is obtained in contravention of the Judges' Rules, it may nevertheless be admitted in evidence provided it was made voluntarily. The principle to be applied was laid down in *Reg. v. Thompson* (2), as approved in *Ibrahim v. Regem* (3). In the latter case, LORD SUMNER said:

"It has long been established as a positive rule of English criminal law, that no statement by an accused is admissible in evidence against him unless it is shown by the prosecution to have been a voluntary statement, in the sense that it has not been obtained from him either by fear of prejudice or hope of advantage exercised or held out by a person in authority. The principle is as old as LORD HALE."

It is to be observed, as this court pointed out in *Rex v. Murray* (4), that, while it is for the presiding judge to rule whether a statement is admissible, it is for the jury to determine the weight to be given to it if he admits it, and thus, when a statement has been admitted by the judge, he should direct the jury to apply to their consideration of it the principle as stated by LORD SUMNER, and he should further tell them that, if they are not satisfied that it was made voluntarily, they should give it no weight at all and disregard it. Unfortunately, the learned deputy chairman did not give a clear direction to the jury with regard to that aspect of the matter. He told them that they must be sure that it was a genuine confession and that they must decide whether the officers had threatened that the appellant would not be given bail unless he talked, but he omitted to tell them in plain words that, unless they were satisfied

(1) [1918] 1 K.B. 331

(2) 57 J. P. 312; [1893] 2 Q.B. 12

(3) [1914] A.C. 599, 609

(4) 114 J.P. 609; [1950] 2 All E.R. 925; [1951] 1 K.B. 391

that it had been made voluntarily, they should reject it and, in view of the fact that it was the only evidence against the appellant, acquit him.

In one passage of the summing-up he said:

"There it is. The chief ground of complaint, it seemed to me, was that the young man was not cautioned earlier. After some thirty years' experience in the criminal courts of this country, there is nothing that I know of to prevent officers questioning a man in the way that they did and if I had thought that there was anything improper about it at all I would not have hesitated for one second to have said so and I should have ruled that statement out and that would have been the end of the case. But there it is; it is in and Mr. Crowder has got to admit that it is in because he has got to accept my ruling",

and that was followed by another passage in which he said:

"There was a long discussion and talk about the question of comparing notes, the question of whether they were made independently or whether they had been made in concert, and so on. The question of threats was raised: 'If you don't talk you won't have bail' and so on. It was put to the officers that Bass, when he went into the box, would swear that that threat was made and it is entirely a matter for you to decide whether you think that those police officers did utter that threat and that the defendant is telling the truth or whether you think that the officers are telling you the truth when they deny that any such threat was made. That is essentially a point for the jury; it is entirely a matter for you to consider. If the threats were made it would be most improper and that would be sufficient in itself to rule out the whole of those statements and I would not have any hesitation in doing it. It is one of those things we will not tolerate in this country, any attempt to extract admissions, 'wring them'—as we have heard with almost monotonous regularity—'Did you wring from him . . .' and so on. Do you see any evidence of wringing from anybody? Perhaps 'obtaining' would be a better word and perhaps a more polite word. But there it is. Was there any wringing? Was there any threat uttered or was it just an ordinary questioning of a man who was under certain suspicion? That is what it comes to."

The jury may well have thought, in view of those observations, that they were being asked to decide a matter which had already been decided by the learned deputy chairman. This was a case in which police officers, without any evidence, had interviewed the appellant, and without first administering a caution had obtained a confession from him and that confession was the only evidence that the prosecution had against him. If in the circumstances of this case the learned deputy chairman had, in the exercise of his discretion, refused to admit the confession we should not have been surprised. As, however, he admitted it, we feel that the vital question whether it was made voluntarily was not adequately left to the jury.

With regard to the second ground of appeal, the matter stood in this way. The officers' notes were almost identical. They were not made at the time of the interview. One officer made his notes after the appellant had been charged, and the other officer made his an hour later. Counsel for the appellant suggested to the officers in cross-examination that they had collaborated. They denied that suggestion. This court has observed that police officers nearly always deny that they have collaborated in the making of notes, and we cannot help wondering why they are the only class of society who do not collaborate in such a matter. It seems to us that nothing could be more natural or proper,



when two persons have been present at an interview with a third person, than that they should afterwards make sure that they have a correct version of what was said. Collaboration would appear to be a better explanation of almost identical notes than the possession of a superhuman memory.

In view of the denial of collaboration, counsel for the appellant asked the learned deputy chairman to allow the jury to see the officers' notebooks, but he refused, and the following passage occurred:

"Q.—You do not think that there is anything extraordinary—the jury will have the advantage of seeing those notebooks . . . (The deputy chairman:) That is if I allow it, Mr. Crowder. I am not disposed to let juries see police officers' notebooks. Sometimes they can contain matters of the highest confidential nature and I do not encourage it in the least; in fact, I like counsel to refer to only the few pages of the notebook affecting the particular case. I do not like them out of police officers' hands very long. I notice that you have had them in your hands now about half an hour or so. (Mr. Crowder:) Is your Lordship suggesting that I will alter them in any way? (The deputy chairman:) No. I am suggesting nothing of the sort. I was only suggesting the view I took about police officers' notebooks and I do not like them out of their hands. I have known cases where their notebooks have been taken away with notes that they made many months before and then they cannot remember them and they have been criticised for it. I do not like that. (Mr. Crowder:) My Lord, I would submit in this case that those officers, whose notes are the same, have in fact written them . . . (The deputy chairman:) I know—that they made them in collaboration. If I have heard that suggestion made once I have heard it made a hundred times, and my usual comment to the jury is 'Yes, if they collaborate, that is wrong; if there is a difference between the two officers' stories or accounts of an interview, that is wrong because there are discrepancies; so we must have the best of both worlds'. That is what I will tell the jury today. I think, if you do not mind, I would like that notebook handed back to the officer. (Mr. Crowder:) Certainly. I ask formally that both these notebooks, as they have been used in evidence by the officers, be exhibited as exhibits in this case. (The deputy chairman:) Well, I refuse. I want them handed back to the officers as soon as possible."

Thereupon the notebooks were returned to the officers.

The desire of the learned deputy chairman to preserve the confidential nature of the notebooks could probably quite easily have been achieved with the assistance of a pin or a piece of sticking plaster so that only the relevant pages could have been read. Be that as it may, however, the jury should have been permitted to see the notebooks. The credibility and accuracy of the two police officers was a vital matter, for it was on their evidence and their evidence alone that the whole of the case against the appellant rested, and, as they had denied collaboration in the making of their notes, the jury should have been given the opportunity of examining them. Had this been the only ground of appeal, we might have considered applying the proviso, but, in view of the other matters with which we have dealt, we felt obliged to quash the conviction.

*Conviction quashed.*

Solicitors: *Philip Conway, Thomas & Co.* (for the appellant); Solicitor, *Metropolitan Police* (for the Crown).

T.R.F.B.

## COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., BYRNE AND PARKER, JJ.)

Mar. 30, 31, Apr. 1, 1953

REG. v. WILLIAMS AND ANOTHER

*Criminal Law—Larceny—"Fraudulently"—Money—Defence of intention to replace—Larceny Act, 1916 (6 & 7 Geo. 5, c. 50), s. 1 (1).**Criminal Law—Indictment—Duplicity—Larceny—Count charging aggregate of sums charged in other counts.*

By s. 1 (1) of the Larceny Act, 1916: "A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

The appellants, who were a sub-postmistress and her husband, were convicted of stealing money from the sub-post office, the evidence being that they took coins and notes from the post office till and put them either into that of a shop carried on by the husband at the same premises or into their own pockets. With regard to two counts of the indictment on which they were convicted, the jury found that they intended to repay the money and honestly believed they would be able to do so, and with regard to three other counts, on which also they were convicted, the jury found that they intended to repay the money, but had no honest belief that they would be able to do so.

HELD: that the word "fraudulently" in the definition of larceny meant that the taking must be intentional and deliberate, and with knowledge that the property of another person was being taken; that a mere hope or expectation of being able in the future to replace money taken was not a defence to larceny and could, at the most, go to mitigation; and that, therefore, the appellants were rightly convicted of larceny on all the aforementioned counts.

Direction of Channell, J., in *Re v. Carpenter* (1911) (76 J.P. 160) applied.

The appellants were convicted also on a sixth count charging the larceny of an aggregate sum, composed partly of sums charged in other counts and partly of sums not charged in the indictment.

HELD: that that count was bad for duplicity, and the convictions on it must be quashed.

Observations on the desirability of a sub-postmaster being charged with fraudulent conversion rather than larceny in circumstances such as existed in the present case.

The appellants, who were husband and wife, were convicted at Monmouthshire Quarter Sessions on seven counts of an indictment containing eight counts—on the first count of the larceny of £40, on the third count of the larceny of £43, on the fourth count of the larceny of £100, and on the sixth count of the larceny of £543 1s. 1d. which represented the aggregate of the sums charged in the earlier counts and certain other sums, the money in each case being the property of the Postmaster-General. The seventh and eighth counts alleged offences of falsification of accounts. On the second count of the indictment they were acquitted. They were sentenced, in respect of the sixth count, the husband to thirty months and the wife to eighteen months' imprisonment, and in respect of the other counts, each to concurrent terms of one, twelve, and twelve months' imprisonment.

The wife was sub-postmistress at a village in Monmouthshire and her husband carried on a general shop at the same premises. The keeping of the accounts of both sub-post office and shop was managed entirely by the wife. The husband being in money difficulties with regard to the business of the shop, the wife, with the knowledge of the husband, took money, the property of the Postmaster-General, from the post office till. Both the wife and husband stated in evidence that they thought they would be able to repay the money out of the wife's

post office salary and from sales in the shop. False accounts had admittedly been put forward to conceal what was going on. The jury added a rider to their verdict, that, in respect of counts one and three, the appellants intended to repay the money and honestly believed that they would be able to do so, and that with regard to counts four and six they intended to repay, but had no honest belief that they would be able to do so.

*Buzzard* for the appellants.

*R. C. Hutton* and *A. L. Gordon* for the Crown.

**LORD GODDARD, C.J.**, delivered the judgment of the court in which he stated the facts and continued: The charge against the appellants was one of stealing the coins and notes by taking them from the post office till and either putting them in the till belonging to the shop or into their pockets. We have to consider whether or not that amounts to larceny, considering that the appellants might quite properly have accounted to the Postmaster-General by paying over different coins of a like amount or notes representing the full amount of the takings. We have also to consider the question whether or not the fact that the jury found that in respect of two counts the appellants intended to repay and had reasonable ground for believing that they could repay affords a defence, and in regard to the other counts whether the fact that they intended to repay, but had no reasonable ground for their belief, amounts to a defence. That would, of course, leave the conviction still untouched as regards the offences relating to falsification of accounts, as to which, as far as the court can see, there was no possible defence.

The definition of larceny in s. 1 (1) of the Larceny Act, 1916, is:

"A person steals who, without the consent of the owner, fraudulently and without a claim of right made in good faith, takes and carries away anything capable of being stolen with intent, at the time of such taking, permanently to deprive the owner thereof."

Doubts have arisen, which appear in some judgments and the text-books, as to what is the meaning of the word "fraudulently" in that sub-section. It is well known that the Larceny Act, 1916, which was a codifying Act, was never intended to alter the law. The question is: What is the meaning of the word "fraudulently", and does it add anything to the words "without claim of right"? It was, apparently, the opinion of **PARKE, B.**, in *Reg. v. Holloway* (1), that the words "wrongful" and "fraudulent" meant without claim of right, but the first thing that should be remembered is that it is undoubtedly the law that an innocent taking and a subsequent appropriation with knowledge that the property does not belong to the taker does not amount to larceny. The subsequent misappropriation or conversion will not turn an innocent taking into a felonious taking for the purposes of larceny. There must be first an intention permanently to deprive the owner of his property in the goods. There must also be an absence of a claim of right. If a person honestly believes that he has a right to the property, and the taking is in vindication of, or in exercise of, a bona fide claim of right, he is not acting feloniously. But sub-s. (1) says "fraudulently and without a claim of right", and counsel for the appellants rightly says that it is the duty of the court to give a meaning to every word in the section. He submitted that the word "fraudulently" means intending to act to the detriment of any person against that person's wishes. The court thinks that the word "fraudulently" does add, and is intended to add, something to the words "without a claim of

(1) (1849), 13 J.P. 54; 2 Car. & Kir. 942.

right", and it means (though I am not saying that the words I am about to use will fit every case, but they certainly will fit this particular case) that the taking must be intentional and deliberate, that is to say, without mistake. You must know, when you take the property, that it is the property of another person and that you are taking it deliberately, not by mistake, and with an intention to deprive the person of the property in it.

A great part of the discussion in the court below took place because the defence was submitting that, if the appellants intended to repay and had reasonable grounds for repayment, that would be an answer. We have to point out, as has been pointed out more than once in the course of the argument, that we are here dealing with the case of coins, and there is no question that, having taken the coins or the notes from the till and used them in their own business, the appellants intended permanently to deprive the Postmaster-General of those coins and notes. Does it make any difference that they intended to replace them, which can only mean in this case that they hoped they would be able to replace them? It is one thing if a person with good credit and plenty of money uses somebody else's money which is in his possession—it having been entrusted to him or he having the opportunity of taking it—he merely intending to use those coins instead of some of his own which he has only to go to his room or to his bank to get. No jury would then say that there was any intent to defraud or any fraudulent taking, but it is quite another matter if the person who takes the money is not in a position to replace it at the time but only has a hope or expectation that he will be able to do so in the future, and, in considering whether this court is to give effect to the rider of the jury, we must bear in mind the pronouncement which is the *locus classicus* in this matter—CHANNELL, J.'s charge to the jury in *Rex. v. Carpenter* (1), referred to by this court in *Rex. v. Kritz* (2). The direction of the learned judge was given in relation to a charge of false pretences, but on this point about honest intention it is just as apposite in a case of larceny. CHANNELL, J., said:

"If the defendant made statements of fact which he knew to be untrue, and made them for the purpose of inducing persons to deposit with him money which he knew they would not deposit but for their belief in the truth of those statements, and if he was intending to use the money so obtained for purposes different from those for which he knew the depositors understood from his statement that he intended to use it, then, gentlemen, we have the intent to defraud, although he may have intended to repay the money if he could, and although he may have honestly believed, and even had good reason to believe, that he would be able to repay it. You see it is the fraud in the mode of getting the money because you may by fraud get hold of money even if you mean to repay it, and thoroughly believe that you can repay it—you are still defrauding the man. You are not defrauding him of the money if you eventually do repay it, but you are defrauding the man because you are giving him something different altogether from what he thinks he is getting, and you are getting his money by your false statement. In such a case as that the false statement would not be honestly made, and this question as to the intent to defraud substantially comes to this, whether or not the statements were honestly made."

In the present case for "statements", we have to substitute "actions" because the money was taken and not obtained by statements. The appellants intended to use the money for purposes different from those for which they

(1) (1911), 76 J.P. 158, 160.

(2) 113 J.P. 449; [1949] 2 All E.R. 406; [1950] 1 K.B. 82.



were holding it and for which the persons who paid the money intended it to be used, namely, for paying the Postmaster-General for stamps or postal orders, and for purposes different from those which their employer (the Postmaster-General) to their knowledge intended they should use it. Therefore, it seems to the court that, by taking the actual coins and notes and using them for their own purposes, the appellants intended to deprive the Postmaster-General of the property in those notes and coins, and in so doing they acted without a claim of right and fraudulently because they knew they had no right to take the money which they knew was not theirs. The fact that they may have had a hope or expectation in the future of repaying that money is a matter which at most can go to mitigation. It does not amount to a defence. Therefore, the appellants' own evidence shows that they were guilty of the larcenies with which they were charged.

As the sentences of eighteen months and two and a half years' imprisonment were passed on the count we have quashed, the sentences on both the appellants on the other counts, namely, one month, twelve months, and twelve months, all concurrent, will stand, so each appellant will serve the same sentence.

*Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellants); *Solicitor for the Post Office* (for the Crown).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PARKER, JJ.)

Apr. 16, 1953

BARNES v. JARVIS

*Sunday Entertainment*—"Musical entertainment"—*Imitations and sketches by individual performer—Accompaniment by piano—Sunday Entertainments Act, 1932 (22 & 23 Geo. 5, c. 51), s. 5.*

The respondent was charged under s. 51 (9) of the Public Health Acts Amendment Act, 1890, with allowing a theatre to be used for entertainment other than musical entertainment as defined in the Sunday Entertainments Act, 1932, contrary to the terms of a licence issued to him in respect of the theatre under s. 51 (1) of the Act of 1890. The entertainment consisted of various imitations and sketches by an individual performer, accompanied by a pianist playing music appropriate to and adapted to fit in with the various items. By s. 5 of the Act of 1932 "musical entertainment" is defined as "a concert or similar entertainment consisting of the performance of music, with or without singing or recitation." The justices dismissed the informations.

HELD: that the entertainment was merely an ordinary music hall variety turn and not a "musical entertainment" within the meaning of the definition and the case must be remitted to the justices with a direction to convict.

CASE STATED by Blackpool justices.

At a court of summary jurisdiction sitting on Sept. 24, 1952, at Blackpool, the appellant, Harry Barnes, preferred informations against the respondent, Harold Jarvis, charging that on Sunday, June 29, and Sunday, July 6, 1952, he, being the holder of a licence issued by the justices under the Public Health Acts Amendment Act, 1890, s. 51 (1), for dancing, singing and music in respect of the Hippodrome Theatre, Blackpool, did on the said days commit a breach of a term and condition on which, under s. 51 (2), the licence was granted in

that the theatre in question was used for an entertainment other than a musical entertainment as defined by the Sunday Entertainments Act, 1932, contrary to the terms and conditions of the licence and to the Act of 1890.

It was proved or admitted that the respondent was the holder of a licence granted under the Act of 1890 for the Hippodrome Theatre, condition 3 of which was in the following terms:

"The licensed premises shall not be used for public music, dancing, singing or other public entertainment of the like kind on Sunday except for musical entertainments as defined by the Sunday Entertainments Act, 1932, from 2.30 p.m. to 10 p.m."

On Sundays, June 29, and July 6, 1952, an entertainment was given twice nightly at the theatre, of which one of the items was a performance by one Al Read. His act started with a characterisation of two women gossiping, and contained among other things a caricature of a wife nagging at her husband to decorate a bedroom in preparation for the visit of his mother-in-law, a description in dialogue and mime of a decorator making an inspection of the house with derogatory remarks as to its state and construction, a comedy sketch depicting a newly married couple and the husband's visits to a public house, and finally an imitation of two drunken men in a public house inviting each other home for a night out. During this act Mr. Read was given musical accompaniment by a Mr. Broadbent who played a piano on the stage. It was proved that the musical score had been specially prepared beforehand by Mr. Broadbent so as to be appropriate to Mr. Read's script, that they had rehearsed the act for two hours before the first performance, and that the pianist had to adapt his accompaniment to fit in with the words, inflexion, and voice of Mr. Read so as to provide "atmosphere" for the spoken word. At the end of his performance Mr. Read sang two songs accompanied by the full orchestra.

It was contended on behalf of the appellant that the performance of Mr. Read did not consist of "musical entertainment" within s. 5 of the Sunday Entertainments Act, 1932, but that it amounted to a variety entertainment with music played contemporaneously but not coordinated with the words as in a song or musical monologue. On behalf of the respondent it was contended that the act was a musical entertainment within s. 5, that the music and words had been carefully coordinated, and that the performance consisted of a recitation with music. The justices dismissed the informations, and the appellant appealed.

*G. W. G. Jones* for the appellant.

*Nahum, Q.C.*, for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county borough of Blackpool before whom the respondent was summoned for that he being

"the holder of a licence issued to him by the justices of the said county borough on Feb. 4, 1952, under s. 51 of the Public Health Acts Amendment Act, 1890, for dancing singing and music in respect of the Hippodrome Theatre, Church Street, Blackpool",

committed a breach of the condition on which it was granted because he used the premises in respect of which the licence was granted

"for an entertainment other than a musical entertainment as defined by the Sunday Entertainments Act, 1932."

The licence which had been granted to the respondent contained a condition that:

"The licensed premises shall not be used for public music, dancing, singing or other public entertainment of the like kind on Sunday except for musical entertainments as defined by the Sunday Entertainments Act, 1932 . . ."

The Sunday Entertainments Act, 1932, was an Act, to quote its long title,

" . . . to permit and regulate the opening and use of places on Sundays for certain entertainments and for debates, and for purposes connected with the matters aforesaid."

It was an Act somewhat to mitigate the rigours of the Sunday Observance Act, 1780, and in s. 3 of the Act, the marginal note of which is "Provision as to musical entertainments", it is provided:

"The power of any authority in any area to grant licences under any enactment for the regulation of places kept or ordinarily used for public dancing, singing, music or other public entertainment of the like kind, shall include power to grant such licences in respect only of musical entertainments on Sundays, and the power to attach conditions to any such licence shall include power to attach special conditions in respect of such entertainments on Sundays."

The first thing to observe, therefore, is that under s. 3 there was a distinction between public dancing and public singing and music, and obviously the intention of the Act is that music was to be the governing or predominant feature. There is power to attach special conditions in respect of musical entertainments on Sundays. By s. 5, "musical entertainment"

"means a concert or similar entertainment consisting of the performance of music, with or without singing or recitation."

The definition says "with or without singing or recitation," but observe that the entertainment must be a "concert or similar entertainment". I agree that in applying a definition of this sort there may be cases which are on the line, and it may be difficult to decide whether or not a case falls on one side of the line or the other, but on the facts found by the justices in this case it seems abundantly clear that the performance given by Mr. Al Read was nothing but an ordinary music hall variety turn. To call his performance "musical entertainment" merely because he had somebody on the stage playing the piano at the same time as he was giving one of his comic "turns", consisting of imitations, dialogues, and representations of two women nagging each other, two old ladies discussing their adventures, and things of that sort, is simply to call it something which it is not. One has to apply a certain amount of common sense in construing statutes and to bear in mind the object of the Act, and the object of the Act of 1932 is clearly to permit of there being given on Sundays public entertainment of the nature of what anybody would call a concert. If a music hall artist appears on the stage and gives an entertainment consisting of patter, that cannot by any stretch of imagination be called a musical entertainment in the nature of a concert merely because there is somebody at the back of the stage playing a piano or even an orchestra which plays so softly that the artist's words can be heard above the music.

In my opinion, on the facts here the only conclusion to which the justices could properly have come if they had properly directed themselves as to the meaning of s. 3 and the definition in s. 5 of the Act of 1932 was that this was

not a "concert or similar entertainment" in so far as, at any rate, this particular turn is concerned. The case must go back to the justices with a direction to convict.

LYNSKEY, J.: I agree.

PARKER, J.: I agree.

*Appeal allowed.*

Solicitors: *Gibson & Weldon*, agents for *Worden & Naylor*, Blackpool (for the appellant); *Denton, Hall & Burgin*, agents for *Blackhurst, Parker & Co.*, Blackpool (for the respondent).

T.R.F.B.

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### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSKEY AND PARKER, JJ.)

Apr. 17, 1953

SYKES *v.* MILLINGTON

*Road Traffic—Goods vehicle—Person using—Hire by owner to company—Driver paid and insured by owner—Orders as to journeys given to driver by company—Use outside radius permitted by owner's licence—Road and Rail Traffic Act, 1933 (23 & 24 Geo. 5, c. 53), s. 1 (3).*

The respondent, a haulage contractor, held two "B" licences entitling him to carry goods for hire or reward within certain limits. A company held a "C" licence entitling it to hire a vehicle and use it for the carriage of goods without any limit as to distance. On a number of occasions the company hired a vehicle from the respondent with one of the respondent's drivers and used it to carry goods outside the radius permitted by the respondent's licences. On each occasion the respondent paid the driver's wages and insurance contributions, but the driver received from the company orders with regard to where he was to go and what he was to do. The respondent was charged on a number of informations with unlawfully using vehicles for the carriage of goods for hire or reward on behalf of the company otherwise than in accordance with the conditions of his "B" licences, contrary to s. 2 (3) of the Road and Rail Traffic Act, 1933, and the justices dismissed the informations.

HELD, that the drivers were the servants of the respondent, and that, as under s. 1 (3) of the Act of 1933 he was in those circumstances to be deemed to be the person by whom the vehicles were being used, he was guilty of the offences charged, and the case must be remitted to the justices with an intimation that the offences were proved.

CASE STATED by Hampshire justices.

At a court of summary jurisdiction sitting at Havant on Oct. 24, 1952, the appellant, Kenneth Tredgold Sykes, a traffic examiner to the licensing authority, South Eastern Traffic Area, preferred eight informations against the respondent, Henry Edmund Millington, charging that on May 14, 20, 21, June 24, and July 9, 22, 23 and 24, 1952, he unlawfully used three vehicles for the carriage of goods for hire or reward on behalf of Messrs. Maurice Hill Construction Co., Ltd., otherwise than in accordance with the conditions imposed in his B carrier's licence, contrary to s. 2 (3) of the Road and Rail Traffic Act, 1933. The appellant also preferred three informations against the respondent, charging that on May 14 and 21 and July 24, 1952, he unlawfully used two of the vehicles for the carriage of goods for hire or reward without the authority of a permit, contrary to s. 52 (1) of the Transport Act, 1947.



It was proved or admitted that the respondent, who carried on business as a haulage contractor at Bedhampton, was the holder of two B licences. The first of these licences related to vehicles FBK 118 and FRV 74, and limited the use of those vehicles thereunder to the carriage of milk, corn, cattle foods, furniture and effects within seventy-five miles, and of other goods within thirty miles, of Havant railway station. The second licence related to vehicle GPX 353 and limited its use thereunder to the carriage of milk, corn and cattle foods, within twenty-five miles of Havant railway station. On each of the dates referred to in the informations one or other of the vehicles was being used to convey building materials and plant belonging to the company to places more than thirty miles from Havant railway station. On each occasion the driver of the vehicle in question was either one Alderson or a son of the respondent. Alderson was in the respondent's employment and he paid his wages and included them in his return for employer's liability insurance. The respondent did not pay his son any regular wages, but provided him with board and lodging and, in addition, money. The respondent also paid the contributions due from an employer under the National Insurance Acts for both Alderson and his son. The company held a C licence authorising it to use any one vehicle hired by it for the carriage of goods in the course of its trade or business. The distance within which a hired vehicle might lawfully be used by the company was not limited, and the appellant admitted that the C licence would allow a hired vehicle to make the journeys to the places and for the purposes for which it was being used on each of the dates referred to in the informations. There was no contract in writing between the respondent and the company in respect of the vehicles. Arrangements were made orally by telephone under which a vehicle and a driver were sent from the respondent's depot to the company's office, the driver there being told where he had to go and what he had to do. The respondent would not necessarily know what the company's instructions were until after the vehicle returned after the work had been completed, and he had no control over the vehicle after it had reported at the company's office. The company paid the respondent for the use of the vehicles, the amount being calculated on either a time or a mileage basis. The company at no time paid any wages to the drivers, but the respondent kept a separate record of the wages attributable to the periods during which the vehicles were working for the company, and took them into account in making charges against the company. The records required under s. 16 of the Road and Rail Traffic Act, 1933, were kept in duplicate, one copy being at the company's office and one at the respondent's office.

It was contended on behalf of the appellant that (i) as the vehicles were hired with the drivers by the company and the drivers' wages and insurance stamps were paid by the respondent, the drivers were at all times his servants; (ii) by virtue of the Road and Rail Traffic Act, 1933, s. 1 (3), the vehicles were, at the material times, to be deemed to be used by him; and (iii) as the journeys were not in accordance with the conditions of the respondent's B licences he was guilty of the offences charged. It was contended on behalf of the respondent that, as at the material times the drivers were under the orders of the company, they were the company's servants, or, at any rate, their agents, within the meaning of the Road and Rail Traffic Act, 1933; that the lorries were being used by the company in accordance with their C licence; and, that, therefore, no offence had been committed.

The justices dismissed the informations and the appellant appealed.

*J. P. Ashworth* for the appellant.

*Threlfall* for the respondent.

**LORD GODDARD, C.J. :** This is a Case stated by justices for the county of Hampshire, before whom the respondent was charged on eight informations with unlawfully using vehicles for the carriage of goods for hire or reward on behalf of Messrs. Maurice Hill Construction Co., Ltd., otherwise than in accordance with the conditions imposed on his B carrier's licence, contrary to s. 2 (3) of the Road and Rail Traffic Act, 1933.

[His LORDSHIP stated the facts and continued:] Section 1 of the Road and Rail Traffic Act, 1933, provides:

"(3) When a goods vehicle is being used on a road for the carriage of goods, the driver of the vehicle, if it belongs to him or is in his possession under an agreement for hire, hire purchase or loan, and in any other case the person whose agent or servant the driver is, shall, for the purposes of this Part of this Act, be deemed to be the person by whom the vehicle is being used. (4) Where at any time goods are carried in a goods vehicle, being a vehicle which has been let on hire by the person who at the time of the carriage of the goods is within the meaning of this Part of this Act the user of the vehicle, the goods shall be deemed to be carried by that person for hire or reward".

Applying the tests which have been laid down, the principal one being by the House of Lords in *Mersey Docks & Harbour Board v. Coggins & Griffith (Liverpool), Ltd.* (1), this case is too clear for argument so far as the question of whose servants these drivers were. They were at all times the servants of the respondent. The respondent paid the wages and the insurance contributions for them, and what he was doing was making money by hiring out his lorries, together with a driver, to a person who held a C licence, and the person who held that licence held a licence which enabled him to hire.

I can well understand why the justices tried to see if they could find a way of dismissing these summonses because the whole thing seems to me to be somewhat in the nature of a trap. One hopes that something may be done, either by inserting terms in licences or giving notice to licence holders of the curious result which seems to follow if a person holds a C licence which enables him to hire a lorry. If he hires a motor vehicle with a driver and makes use of the vehicle he commits no offence, but the person who hires out his vehicle to the hirer who has a C licence may commit an offence. The material words of s. 1 are contained in sub-s. (3). The only question, therefore, is whether the persons who drove these vehicles were the agents or servants of the respondent? As I have said, it is perfectly clear, by any test you like to apply, that they were the servants of the respondent. The justices said they would not decide whose servants they were, but that they did decide that they were the agents of Maurice Hill Construction Co., Ltd. A man cannot be the servant of A and the agent of B in performing the same piece of work. He is either the servant of A or the servant of B, though he may become the agent of B. No one doubts that. Counsel for the appellant, in the course of the argument, gave an illustration in which one person was doing something for another person, not as servant but as agent. I cannot see how it is possible to say, if my servant is doing something as my servant—for instance, driving my car as my servant—that the mere fact that I have lent the car to a friend and told my driver to drive him makes him the friend's agent. He remains my servant all the time. There might be circumstances in which the person driving the car would not be my servant, because the relationship of master and servant might be changed, but there was no evidence here on which the justices could find that the drivers were the servants

(1) [1946] 2 All E.R. 345; [1947] A.C.1.

of any person except the respondent. Therefore, they could not find that they were the agents of Messrs. Maurice Hill Construction Co., Ltd., and the case must go back to the justices with an intimation that the offences were proved.

**LYNSKEY, J. :** I agree. The respondent was granted a class B licence by the road licensing authority, and it is provided in s. 2 (3) of the Road and Rail Traffic Act, 1933:

"A limited carrier's licence (in this Part of this Act referred to as 'a B licence') shall entitle the holder thereof to use the authorised vehicles, as he thinks fit from time to time, either for the carriage of goods for or in connection with any trade or business carried on by him, or, subject to any conditions which the licensing authority, in the exercise of his discretion to attach conditions to a B licence, may attach to the licence, for the carriage of goods for hire or reward".

The effect of that sub-section, in the absence of any conditions, enables the holder of a B licence to carry his own goods or goods of anybody else for hire or reward without limit as to goods or distance. The effect of the B licence granted to the respondent was that he was only allowed to use his vehicles for limited purposes and was only allowed to carry goods for hire or reward within limits and under restrictions.

The result of the application of s. 1 (4) of the Road and Rail Traffic Act, 1933, to the facts of this case on the finding that the respondent let his vehicles for reward to Maurice Hill Construction Co., Ltd., and was carrying their goods, is that he was to be deemed to be carrying the goods for hire or reward. The goods he was carrying were not permitted to be carried under his licence for the distance for which he carried them, so that he was clearly in breach of his licence if he was using his vehicles for that purpose. It is said that he was not using his vehicles for that purpose, and that, although the facts come exactly within what is contemplated by s. 1 (4), nevertheless, the justices ought to have held, and did hold, that these vehicles were being used not by the respondent but by Maurice Hill Construction Co., Ltd. The justices did not decide whose servants were driving the vehicles at the time, but they said that the vehicles were being driven by the agents for Maurice Hill Construction Co., Ltd. So far as I can see, they found that there was no evidence that the drivers of these vehicles, either Alderson or the respondent's son, were ever the agents for Maurice Hill Construction Co., Ltd. in the driving of those vehicles, and that is the matter that has to be considered.

[HIS LORDSHIP read s. 1 (3) of the Road and Rail Traffic Act, 1933, and continued:] It is clear that the drivers of these vehicles—there was no direct finding on the matter, but the inference is clear—were the servants of the respondent, and, as they were his servants, one is bound to hold that the vehicles were deemed to be used by him, whether they were or not. There is no room for the finding that either of the drivers could be treated as being the servants of the respondent for one purpose and the agents of Maurice Hill Construction Co., Ltd. for another purpose, because only one person is to be deemed to be using a vehicle. Apart from that, it seems to me that the driver, if he is the agent of anybody at all, is an agent for his employer. He is an agent for his employer in driving the vehicle, not for the carriage of the goods, but for the purpose of earning the hire which the employer gets for the use of his services and for the use of the vehicle.

It is said that there was a C licence issued in favour of Maurice Hill Construction Co., Ltd., but that was a licence granted to that company and not to the

respondent, and it does not purport to alter the conditions of the respondent's licence. It seems to me that the respondent was in breach of his licence and had, therefore, committed an offence. The fact that a C licence existed might have caused, and, perhaps, it was liable to cause, confusion in the minds of those who had to operate these vehicles, and I agree with my Lord that it would be desirable to make the conditions of the C licence clear, and also to make it clear that the holder of a licence, if he is going to use other people's vehicles for the purpose of taking advantage of the privileges granted to him, must be careful to hire a vehicle which, by the terms of its licence is not limited or receives express permission to do extended journeys, or which is a public service vehicle available for general hire. Unless he takes those steps, not he, but the person whose vehicle he hires is going to get into trouble because he is, in fact, in breach of the conditions of the licence. For those reasons, I would allow the appeal.

**PARKER, J.:** I agree with both judgments.

*Case remitted.*

Solicitors: *Treasury Solicitor* (for the appellant); *Arthur S. Joseph & Cates*, agents for *MacDonald, Jacobs & Oates*, Portsmouth (for the respondent).

T.R.F.B.

## HOUSE OF LORDS

(LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID  
AND LORD COHEN)

Mar. 10, 11, Apr. 20, 1953

### LONDON COUNTY COUNCIL *v.* MARKS & SPENCER, LTD. AND OTHERS

*Town and Country Planning*—"Works for the erection of a building"—*Demolition of existing buildings and clearance of site*—*Erection of new building not begun*—*Town and Country Planning Act, 1947* (10 and 11 Geo. 6, c. 51), s. 78 (1).

*Town and Country Planning*—*Interim development*—*Conditional permission*—*Limitation of time for commencement and completion of work*—*No reason given for imposing condition*—*Validity of condition*—*Town and Country Planning Act, 1932* (22 and 23 Geo. 5, c. 48), s. 10 (3).

In August, 1937, the respondents entered into a building agreement with the freeholder of a site under which, on the completion of agreed buildings on the site, they would become entitled to a lease of the premises for ninety years at an agreed rate. On Aug. 9, 1938, they obtained from the local authority planning permission under the *Town and Country Planning Act, 1932*, and the *Town and Country Planning (General Interim Development) Order, 1933*, for the erection of the new buildings. This permission was granted subject to, *inter alia*, the condition that the work should be commenced within six months and completed within eighteen months of Aug. 1, 1938, "failing which the consent shall become null and void". Plans for the new buildings were approved, and on June 9, 1939, the respondents entered into a written contract with a firm of contractors for the demolition of the existing buildings, which was completed by the end of July, 1939. Due to the international situation no contract for the new buildings was entered into, and during the war the building project remained in abeyance, but the respondents never abandoned it, and execution of the scheme was resumed in November, 1948, when the respondents gave notice to the local authority of their intention to proceed. The authority refused to sanction the development of the site, and the Central Land Board refused the respondent's claim to exemption from development charge.



**HELD:** (i) the words "works for the erection . . . of a building" in s. 78 (1) of the Town and Country Planning Act, 1947, included operations which were not in themselves building operations; in carrying out the demolition, since that was part of the totality of the physical work on the site necessary to carry out the building project, the respondents had begun "works for the erection of a building" within the sub-section; and, therefore, planning permission was to be deemed to have been granted in respect of the completion of the work and no development charge could be determined by the Central Land Board to be payable in respect thereof.

(ii) on the true construction of s. 10 (3) of the Town and Country Planning Act, 1932, the local authority were bound to give a reason for their decision to grant permission subject to a condition, and, as they had failed to do so, the application for planning permission was to be deemed to have been granted unconditionally, and, therefore, the failure of the respondents to comply with the condition attached to the planning permission of Aug. 9, 1938, did not prevent their proceeding with the work.

Decision of COURT OF APPEAL, sub nom. *Re 42-48 Paddington Street and 62-72 Chiltern Street, St. Marylebone* (1952) (116 J.P. 286) affirmed.

**APPEAL** by the London County Council from an order of the Court of Appeal, reported 116 J.P. 286.

*Lawrence, Q.C.*, and *H. E. Francis* for the appellants.

*Capewell, Q.C.*, *J. R. Willis* and *V. M. C. Pennington* for the respondents, Marks & Spencer, Ltd.

*Denys B. Buckley* for the respondents, Central Land Board.

The House took time for consideration.

Apr. 20. The following opinion was read.

**LORD NORMAND:** My Lords, the Court of Appeal reversed the judgment of *HARMAN, J.*, and declared that by virtue of s. 78 of the Town and Country Planning Act, 1947, the respondents, Marks & Spencer, Ltd., must be deemed to have been granted permission by the London County Council under Part III of the said Act for the completion of work for the erection of an office building on the site of Nos. 42-48 Paddington Street and 62-72 Chiltern Street, St. Marylebone, in the county of London in accordance with certain plans submitted to the London County Council and that no development charge can lawfully be determined by the respondents, the Central Land Board, to be payable in respect of the completion of the said works for the erection of the said office building.

The facts are set out by *HARMAN, J.*, in his judgment, to which I refer. It will suffice, therefore, to recapitulate them in the barest outline. Marks & Spencer, Ltd. entered into a building arrangement with the freeholder of the site binding themselves to erect a building in accordance with plans and specifications approved by the freeholder. They also obtained on Aug. 9, 1938, from the London County Council a planning permission or order under the Town and Country Planning Act, 1932, and the Town and Country Planning (General Interim Development) Order, 1933 (S.R. & O., 1933, No. 236), for the erection of the new office building illustrated in plans submitted with the application for permission. The permission was expressly subject to certain conditions of which only the first is material. It runs:

"... subject to (1) The work being commenced within six months and completed within eighteen months from Aug. 1, 1938, failing which the consent shall become null and void . . ."

There were on the site certain buildings the demolition of which was essential to the completion of the proposed office building. In 1939 Marks & Spencer, Ltd., entered into a contract with a firm of demolition contractors to do the necessary work of taking down the existing buildings and clearing and preparing the site.

These works were completed by the end of July, 1939. No contract was made for the erection of the building and no constructive work was begun. The reason for that was the anxious international situation then existing, and subsequently the war prevented until 1948 any attempt to proceed with the building. But Marks & Spencer, Ltd. never at any time abandoned their intention to complete the building for which they had obtained the planning permission.

The first question in this case depends on the proper construction of s. 78 (1) of the Act of 1947. This section, in effect, grants an exemption from other provisions of the Act which require that a planning permission shall be obtained in respect of any development of land carried out after the appointed day (July 1, 1948) and impose development charges in respect of the carrying out of operations for which a planning permission under the Act is required. The material words of s. 78 (1) are:

"Subject to the provisions of this section, where any works for the erection or alteration of a building have been begun but not completed before the appointed day, then if immediately before that day those works could have been completed . . . in accordance with permission granted by or under an interim development order . . . planning permission shall, by virtue of this section, be deemed to be granted under Part III of this Act in respect of the completion of those works."

Marks & Spencer, Ltd. contend that the phrase "works for the erection . . . of a building" means, in relation to the present case, the totality of the physical works on the site necessary to carry out their building project, as authorised in 1938, beginning with the work of demolition and ending with the completion of the building. The London County Council contend that these words refer only to building operations of a constructional nature and not to operations consisting in demolitions or in the clearance of the site. On this issue HARMAN, J., and, in the Court of Appeal, the Master of the Rolls (SIR RAYMOND EVERSHED) were in favour of the London County Council, but JENKINS, L.J., and MORRIS, L.J., found in favour of Marks & Spencer, Ltd.

My Lords, the question lies in a small compass and I find myself wholly in agreement with the reasoning and the conclusion of JENKINS, L.J., and MORRIS, L.J. I shall not repeat what they have said, and I could not find words more apt to express my own views than are to be found in their opinions. It is, nevertheless, proper that I should give reasons for differing from the opinions of HARMAN, J., and of the Master of the Rolls, and that I should consider some aspects of the arguments addressed to us by counsel for the appellants, which were not fully dealt with in the judgments of JENKINS, L.J., and MORRIS, L.J. HARMAN, J., in his judgment held that it was a question of fact whether, at the critical date, works for the erection of a building had been begun but were not finished on the site, and so far I agree with him. But he appears to have thought that the crucial point in the case was that no contract for the erection of the building ever came into existence. I can only say, with deference, that, in my opinion, this is to take too narrow a view because it concentrates on but one fact, and ignores other facts which seem to me material, such as the grant of permission to erect buildings, which necessarily involved demolitions, the identification of the buildings by plans and the fact that the demolition was carried out as a work necessary for the erection of the building. The Master of the Rolls, in my humble opinion, has also taken too narrow a view of the words "works for the erection of a building" in holding that they do not, in such cases as the present, *prima facie* include works of demolition. As regards the other reason which influenced

the Master of the Rolls, I have not found it necessary to consider in what circumstances permission may have been required for demolition works as such under the Act of 1932, for, as I have said, I agree with the opinions of JENKINS, L.J., and MORRIS, L.J., who assumed that demolition works did not require a planning permission. Counsel for the appellants argued that, on the construction of s. 78 (1) of the Act of 1947 adopted by the majority of the Court of Appeal, strange results would follow, and he referred especially to the effect of such a construction on the powers and duties of the planning authority under s. 21, s. 22, s. 26 and s. 30 of the Act. I am not satisfied that the results apprehended by counsel for the appellants would follow, and, in any case, the words of s. 78 (1) are themselves clear and they ought not to be wrested from their plain meaning because it is thought that anomalies may result.

On this first point, therefore, I am of opinion that Marks & Spencer, Ltd. succeed. But there is another point which is equally vital to their success in defending the order pronounced by the Court of Appeal. They have manifestly failed to comply with the condition attached to the planning permission of Aug. 9, 1938, and the London County Council, therefore, maintain that in terms of the condition their consent is null and void. Marks & Spencer, Ltd., however, maintain that the failure to fulfil the condition cannot have that effect because no reason for the condition was given in the order of Aug. 9, 1938, and they refer to s. 10 (3) of the Act of 1932. It reads:

"Where an application for permission to develop land is made to the specified authority in manner provided by the order, the authority may, subject to the terms of the order, grant the application unconditionally or subject to such conditions as they think proper to impose, or may refuse the application, and they shall be deemed to have granted the application unconditionally unless within two months from the receipt thereof, or within such longer period as the applicant may agree in writing to allow, they give notice to him that they have decided to the contrary, stating their reasons for so doing..."

The London County Council argue that "decided to the contrary" means "decided not to grant the application", and this is the construction put on the words by HARMAN, J. Marks & Spencer, Ltd. argue that the phrase means "decided not to grant the application unconditionally". The Court of Appeal has unanimously adopted this construction, and I most respectfully agree with their conclusion and with their reasons. I think that as a matter of language no other view is tenable. The failure to give a reason for the condition brings about a statutory deeming that the application for the planning permission was granted unconditionally. Marks & Spencer, Ltd. succeed on this point also. I would, therefore, dismiss the appeal with costs.

**LORD REID:** My Lords, I am asked by my noble and learned friends, **LORD OAKSEY** and **LORD MORTON OF HENRYTON**, who are unable to be present this morning, to say that they concur in the motion proposed. My Lords, I also concur.

**LORD COHEN:** My Lords, I also concur.

*Appeal dismissed.*

Solicitors: *J. G. Barr* (for the London County Council); *J. C. Parry* (for Marks & Spencer, Ltd.); *Treasury Solicitor* (for the Central Land Board).

G.F.L.B.

## COURT OF APPEAL

(SIR RAYMOND EVERSHERD, M.R., JENKINS AND ROMER, L.JJ.)

March 2, 3, 31, 1953

METROPOLITAN WATER BOARD *v.* HERTFORD CORPORATION*Rates—Water undertaking—"Profits basis"—Water intake—Special fitness—Altitude of hereditament.*

The Metropolitan Water Board occupied under statutory powers as part of their undertaking a hereditament consisting of an intake from the River Lea with screen, fender, gauge house and keeper's living accommodation, sluice house and store hut, and natural spring of water, about 1,950 yards of channel, an area of land about eight acres in extent, bridges, an iron post and rail fence along the New River, and short lengths of forty-eight-inch and thirty-inch mains. Water from the River Lea flowed through the intake and was then conveyed by gravity, first along a channel and thereafter by an artificial water course known as the New River to the filter beds of the board at Stoke Newington, a total distance of about twenty-four miles. The board could usually take about 22½ million gallons a day at this intake. At the Stoke Newington filter beds the level of the filtered water, ready to be pumped into supply, was about sixty feet higher than the level of other water works of the board whereby about sixty feet of pumping height was saved. The same advantage could be obtained, subject to the necessary statutory or other power existing in or being obtained by the board and subject to the construction of a new intake, at any point on the stretch of the River Lea known as the Hertford-Ware-Pound extending to a mile and a third, but not further downstream. The undertaking of the board extended into seven counties and ninety-eight rating areas and comprised some 255 individual hereditaments. There was no dispute (i) that the method of assessment appropriate was the "profits basis," and (ii) that the net annual value in cumulo of the hereditament comprised in the undertaking of the board should be taken to be £1,706,016.

The Hertford Corporation submitted a valuation of £5,000 as representing the net annual value of the hereditament in question, ascertained in accordance with s. 22 (1) (b) of the Rating and Valuation Act, 1925, without regard to the value of the undertaking in cumulo, but, in recognition of the applicability of the "profits basis," reduced that figure by one third to £3,333 to fit in with the cumulo. The corporation regarded the value attributable to the intake as being capable of being estimated, not by process of calculation or by reference to area of land and structural values, but as a matter of skilled professional judgment. The valuation was intended to represent the special value of the hereditament, taking into consideration its special fitness for the board's purposes, the special value being regarded as lying in a small area of about 210 square yards, being the intake and the site of the gauge house, and not in the channels on the hereditament any more than in the course of the New River all the way to London.

At the hearing before the tribunal the board submitted a valuation giving a net annual value of £429 for land covered with water (with a rateable value of £343) and £221 for land not so covered, making a total net annual value for the hereditament of £650. The board's calculation began with the agreed cumulo value of £1,706,016, with a capital value of the entire undertaking estimated at £103,042,380, so that the resulting percentage of the annual value was 1·656 per cent. The board took the value of the land as agricultural land at £200 per acre, adding £456 per acre on account of the natural channels and a further sum for buildings and other structures at double their estimated cost value in 1939, but no addition was made for the altitude of the intake and consequent benefit of gravity in the conveyance by way of the New River of the water passing through it.

The valuation officer, using the same method as the board, submitted a valuation giving a net annual value of £677 (rateable value, £542) for land covered with water and £228 for land not so covered, making a total net annual value of £905. The Lands Tribunal were of opinion that it was not practicable to ascertain a net annual value for the hereditament truly relative to the agreed rental value of the whole undertaking purely by process of estimating and comparing respective capital values and that the value of the hereditament was enhanced by its fitness for assisting the board to achieve the saving in pumping height, and they placed a net



annual value of £1,200 (with a rateable value of £960) on the land covered with water, and a net annual value (and rateable value) of £300 on land not so covered. The board and the valuation officer appealed.

**HELD:** (i) the "profits basis" was no more than an aid to the ascertaining of the rent at which the hereditament might reasonably be expected to let from year to year on the terms stated in s. 22 (1) (b) of the Rating and Valuation Act, 1925, in cases of a particular class. It laid down no inflexible code, but the manner of applying its general principle admitted of variation to suit the peculiarities of individual cases, and there might be cases in which there were special circumstances sufficing to justify its total exclusion. Nevertheless, the "profits basis" had behind it the sanction of long practice and judicial approval over many years, and at the present time it might be said that, as a matter of law, it was *prima facie* the right method to apply in a case of this kind, the onus of showing special circumstances justifying a departure from it being on those who advocated such departure.

(ii) the right way of applying the "profits basis" was to estimate the aggregate capital value of all indirectly productive hereditaments, compute the appropriate percentage thereon in the way contended for by the appellants, and take that percentage of the capital value of the particular hereditament as constituting its net annual value. The Lands Tribunal departed from that normal treatment of indirectly productive hereditaments on the "profits basis" of assessment without any findings of fact to justify such departure, and that failure amounted to an error in law.

*Kingston Union v. Metropolitan Water Board* (90 J.P. 69), applied.

(iii) it was not legitimate to attribute a special value to the hereditament on account of the altitude of the intake, measured by reference to the pumping costs saved by the board by passing the water received through the intake into the New River and along it by gravity to the filter beds at Stoke Newington, whence it could be distributed (still by gravity) to the consumers in certain relatively low-lying parts of the board's area; the altitude was, in effect relevant only in the sense that it narrowed the range of hereditaments on the River Lea from which the board seeking land for the purpose in view would be likely to make its selection, and, by narrowing the range, increased to some extent the price which the hypothetical vendor would be likely to require and which the board might reasonably be prepared to pay; but it was wrong to measure that increase by reference to the loss the board would sustain if deprived of the advantageous use it in fact made of the water received through the intake by reason of the layout and the relative level of other parts of its system.

*Metropolitan Water Board v. Chertsey Assessment Committee* (80 J.P. 137), applied.

(iv) the appeals would be allowed and the case remitted to the tribunal with directions (a) that, unless they were of opinion that there were special circumstances justifying a different course, they should ascertain the net annual value in accordance with the procedure indicated above; (b) if there were special circumstances, to state the facts constituting the same and to indicate the procedure adopted in ascertaining the net annual value; (c) to make such revisions in their valuation as they found necessary.

**APPEALS** by the Metropolitan Water Board and the valuation officer, Inland Revenue, Hertford, against a decision of the Lands Tribunal dated June 26, 1952.

The board was the owner and occupier of a hereditament in the valuation list for the borough of Hertford described as "Chadwell Spring, portion of New River, gauge house, sluices, appurtenances and intake from River Lea," and assessed at: land covered with water £2,221 net annual value (£1,777 rateable value), and land not so covered £332 rateable value. On Mar. 30, 1950, the board made a proposal to reduce the assessment on the ground that the existing values were excessive. On Mar. 29, 1951, a local valuation court of the South Middlesex Local Valuation Panel reduced the assessments to: land covered with water £677 net annual value (£542 rateable value), and land not so covered £241 rateable value. The Hertford Corporation, as rating authority, appealed against that decision to the Lands Tribunal. It was contended on behalf of the corporation (a) that the only lawful point of intake from the River Lea for the board was that fixed by the statute 12 Geo. 2, c. 32,

and that the point could not be altered except by Act of Parliament; (b) even if the board were not so tied, what had to be valued was the hereditament as actually existing, with all its capacities, advantages, disadvantages and limitations, and if the hereditament gave to the board an ability which no other hereditament could give to it, that must be taken into account; (c) the special fitness of the hereditament was that it provided access to water in large quantities at a level which enabled the board by gravitation to supply water to filter-beds sixty feet above the level of such beds at any other works; (d) it was only at the intake that the head of water could be obtained, and it was there that the special fitness lay: there was no special fitness in the whole length of the New River which, although an open water course, was in effect nothing more than a carrying main; (e) the hereditament was the means to the getting of the water from the River Lea so that it could be sold, and as such was rateable; (f) the right of the board in relation to the waters of the River Lea could be taken into account: that would not be valuing the right but would be seeking to consider what rent the board would be prepared to pay for the hereditament to enable them to exercise the right which they already possessed; (g) that in arriving at the amount of the net annual value there was no rule of law to compel the tribunal to proceed by an ascertainment of its capital value; (h) if the tribunal should decide to adopt a method which involved the ascertainment of capital value, the special fitness of the hereditament for the purposes of the board's undertaking should be taken into account.

It was contended on behalf of the board: (a) that as a matter of law the net annual value here in question must be determined (i) on the basis of the effective structural or market capital value of the hereditament in Hertford, and (ii) by applying thereto an appropriate figure of percentage ascertained by comparing the net annual value of the board's undertaking in cumulo with the total effective structural or market capital value; (b) that the method adopted by the corporation was wrong in law and that a judgment of what was the annual value in the sense of the market value of the hereditament, or of the annual value which the hereditament was worth as part of the whole, was irrelevant unless ascertained through its capital value; (c) that it was irrelevant whether the board in fact took a large quantity or only a small quantity of water at the intake; (d) that it must be assumed that the board's undertaking had been let all at once and as one entity, that the board had already become the tenant of the whole, that it was not necessary to consider the value of the hereditament except as a pure matter of apportionment of a rent already ascertained, and that, when there had been ascertained the effective capital values of the assets in the whole undertaking and of those in Hertford, the apportionment to Hertford of an assessment out of the net annual value of the whole undertaking was a pure matter of arithmetic.

The argument on behalf of the valuation officer was substantially similar to that on behalf of the board. The tribunal placed a net annual value of £1,200 (with a rateable value of £960) on the land covered with water and a net annual value (and rateable value) of £300 on land not so covered, and, therefore, allowed to that extent the corporation's appeal.

*Harold Williams, Q.C., and C. E. Scholefield for the water board.*

*Rowe, Q.C., J. R. Willis, and Squibb for the corporation.*

*Maurice Lyell for the valuation officer.*

*Cur. adv. vult.*

Mar. 31. **SIR RAYMOND EVERSHED, M.R.:** In this case I have had the advantage of seeing the judgment prepared by JENKINS, L.J., to which,

I feel, I could not usefully add anything save to state my agreement with it. I am authorised by ROMER, L.J., to say that he also has had the like advantage, and desires to add nothing.

**JENKINS, L.J.**, read the following judgment. These are appeals by the Metropolitan Water Board and the valuation officer from a decision of the Lands Tribunal concerning the assessment of a hereditament described as "Chadwell Spring, portion of New River, gauge house, sluices, appurtenances and intake from River Lea", being that part of the undertaking of the board which lies in the parish of Hertford in the borough of Hertford. The proceedings began with a proposal made by the board on Mar. 30, 1950, for the reduction of the assessment of the hereditament, which then appeared in the valuation list at a net annual value of £2,221 for land covered with water, with a rateable value of £1,777, and a net annual value (and rateable value) of £332 for land not so covered, to £274 net annual value and £219 rateable value for the land covered with water, and £241 net annual value (and rateable value) for the land not so covered. The corporation of Hertford and the valuation officer both gave notice of objection on the ground that the existing values were not excessive and should not be altered, but the valuation officer later amended his notice so as to concede that the values ascribed to the hereditament were excessive and that some alteration should be made in them. The board gave notices of appeal against these objections, and their appeals were heard on Mar. 19, 1951, by a local valuation court who, on Mar. 29, 1951, directed that the valuation list should be altered to show a net annual value of £677 for land covered with water, with a rateable value of £542, and a net annual value (and rateable value) of £241 for land not so covered. From this decision the corporation appealed to the Lands Tribunal, the appeal being contested by the board with the support of the valuation officer, who, however, did not contend for the full amount of the reductions claimed by the board.

The Case stated by the Lands Tribunal for the opinion of this court contains the following findings of fact:

"We found the following facts proved:—(a) The hereditament consists of an intake from the River Lea with screen, fender, gauge house with measuring device and keeper's living accommodation, sluice house and store hut, a natural spring of water known as 'Chadwell Spring', about 1,950 yards of channel, an area of land about eight acres in extent, seven bridges, an iron post and rail fence alongside the New River and round Chadwell Spring and short lengths of forty-eight inch and thirty inch mains. (b) Water from the River Lea flows through the intake and is then conveyed by gravity first along a channel and thereafter by an artificial watercourse known as the New River to the filter-beds of the board at Stoke Newington, a total distance of about twenty-four miles. The board can usually take about 22½ million gallons a day at this intake, although in times of drought the amount so taken may fall to a much lower figure. It has been as low as 10.4 million gallons and, in times of flood, the amount abstracted has reached 32½ million gallons. The average abstraction, expressed in millions of gallons per day, was 18.8 for 1948-49 (Mar. 31), 14.9 for 1949-50 and 21.2 for 1950-51. The water taken from the river is joined by any water emerging from Chadwell Spring, which is an unreliable source of supply, has yielded little in recent years, and has been dry, almost invariably, in the summer months. In its course the New River passes eleven well stations where water is pumped and discharged

into the river, thus augmenting the flow. By the time all the well stations have been passed the maximum capacity of the New River is about forty-five million gallons a day and the water, flowing by gravity for the whole of its journey, is discharged on to the board's filter-beds at Hornsey or Stoke Newington. (c) At the Stoke Newington filter-beds the level of the filtered water ready to be pumped into supply is ninety-four feet above ordnance datum against sixteen feet at the board's Lea Bridge works and twenty-nine feet at the board's Walton works on the River Thames. Water for the high altitude neighbourhoods to the west of and near to Stoke Newington can, therefore, be pumped from the ninety-four feet level at Stoke Newington instead of the sixteen feet level at Lea Bridge, a saving of seventy-eight feet, or taking into account the board's main works on the River Thames an average saving of about sixty feet of pumping height. (d) So far as the altitude of the said intake on the River Lea at Hertford renders it possible for water to flow by gravity direct to the filter-beds at Hornsey and Stoke Newington, that advantage could, subject to the necessary statutory or other power existing in or being obtained by the board and subject to the construction of a new intake with ancillary structures, be obtained at any point on the stretch of the River Lea known as the Hertford-Ware Pound extending to one and one-third miles, but could not be obtained further downstream. (e) A plan of the hereditament is annexed hereto marked 'A' and forms part of this Case. The undertaking of the board consists of works, reservoirs, etc., where water is obtained, treated and stored, mains by which the water is conveyed and distributed to consumers and ancillary subjects such as offices, workshops, stores, dwelling-houses, etc. It extends into seven counties and ninety-eight rating areas and comprises some 255 individual hereditaments. There is no dispute as to the net annual value in cumulo of the hereditaments comprised in the undertaking, all the parties having accepted for the purposes of this appeal that it should be taken to be £1,706,016. The controversy between the parties is as to the amount of the assessment which should be placed upon the hereditament in the borough of Hertford forming part of the undertaking."

It is not in dispute that the method of assessment appropriate to the many and various rateable subjects comprised in the undertaking of the board is the method of assessment commonly called the "profits basis" which, though not enjoined by any statutory provision, has long been recognised in practice and judicially approved as *prima facie* the proper method of arriving at the net annual values for rating purposes of the hereditaments comprised in a public utility undertaking, such as that of the board, with many rateable subjects situated in many different rating areas.

The nature and objects of the "profits basis" are authoritatively expounded in *Kingston Union v. Metropolitan Water Board* (1), and particularly in the speech of VISCOUNT CAVE, L.C., and the method is also recognised and approved in the much earlier cases of *Reg. v. Mile End Old Town (Churchwardens & Overseers)* (2), and *Reg. v. West Middlesex Waterworks* (3). It can, I think, be described with sufficient accuracy for the present purpose as a special method of arriving at net annual values which involves as a general rule calculations of the following nature: (a) the ascertainment of the net

(1) 90 J.P. 69; [1926] A.C. 331.

(2) (1847), 11 J.P. 505.

(3) (1859), 23 J.P. 164; 1 E. & E. 716.



revenue produced by the whole undertaking which is treated as representing the net annual value of the entire concern and is commonly known as the "cumulo value"; (b) a division of the hereditaments comprised in the whole undertaking between those directly productive of revenue and those only indirectly so productive; (c) the ascertainment of the net annual value of the indirectly productive hereditaments by the method commonly referred to as the "contractor's basis", i.e., by estimating their respective capital values and taking an appropriate percentage thereon (now, I think, usually the same in a case of this kind as the percentage of the capital value of all the hereditaments comprised in the whole undertaking represented by the cumulo value) as representing the net annual value of all the indirectly productive hereditaments of the undertaking; (d) the deduction of the last-mentioned figure of net annual value from the cumulo value; (e) the apportionment to the indirectly productive hereditaments in each rating area of their individual net annual values ascertained as above, and (f) the allocation to the directly productive hereditaments in each rating area of their proper shares of the balance of the cumulo value in proportion to the amounts of revenue arising in the several rating areas.

The hereditament here in question is admittedly of the indirectly productive class, so that no question as to the allocation of the balance of cumulo value attributable to directly productive hereditaments arises in this case, but references to that essential feature of the "profits basis" method of assessment is necessary in order to appreciate the part played by the assessment of the indirectly productive hereditaments in the entire process, designed as it is to ensure that the hereditaments in each rating area, whether directly or indirectly productive, should be fairly assessed, and at the same time that the aggregate of all the assessments in all the areas should not exceed, but should as nearly as may be equal, the cumulo value.

As appears from the Case Stated, the following valuations were submitted to the tribunal by the corporation, the board and the valuation officer respectively. The corporation submitted a valuation of £5,000 as representing the net annual value of the hereditament ascertained in accordance with the Rating and Valuation Act, 1925, s. 22 (1) (b), without regard to the value of the undertaking in cumulo, but (apparently in recognition of the applicability of the "profits basis") reduced that figure by one-third, i.e., to £3,333

"to fit in with the cumulo and to fit in with a reduction from five per cent. to 3.32 per cent. on capital values estimated on a 1939 basis adopted on behalf of the valuation officer in the apportionment of the value in cumulo in the 1950 re-assessment of all the hereditaments comprised in the board's undertaking."

It should be noted that in submitting this valuation the corporation claimed to have taken into account, *inter alia*, that the intake was a point determined by statute of access to a supply of about 22½ million gallons of water a day, which was necessary to the board, and which would flow by gravity without any pumping to a point sixty feet above the height where elsewhere pumping would normally have to start, and also said that the value attributable to the intake had been regarded as "not being capable of being reliably estimated by a process of calculation or by reference to area of land and structural values but as a matter of skilled professional judgment". The corporation further described this valuation as intended to represent the value of the hereditament taking into consideration its special fitness for the board's purposes, and said that

"the special value had been regarded as lying in a small area of about two hundred and ten square yards of land, being the intake and the site of the gauge house and not in the channels on the hereditament any more than in the course of the New River all the way up to London."

The board submitted a valuation giving a net annual value (as defined by s. 22 (1) (b) of the Act of 1925) of £429 for land covered with water (with a rateable value of £343) and £221 for land not so covered, making a total net annual value for the hereditament of £650. The board's calculation, as described in the Case Stated, is more explicit in its acceptance of the "profits basis". It begins with the agreed cumulo value of £1,706,016. It then expresses that figure as a percentage of the capital value of the entire undertaking arrived at by taking land at its estimated 1939 value and adding double the 1939 effective cost value for structures, plant and mains. The capital value thus estimated being £103,042,380, the resulting percentage is 1.656 per cent. The calculation then proceeds to apply the same percentage to the capital value (ascertained in the same way) of the indirectly productive assets (amongst them the hereditament now in question) included in the £103,042,380, presenting the result as the net annual value of all the indirectly productive hereditaments out of which the like percentage of the capital value of the particular hereditament now in question represents the net annual value of that hereditament.

The main matter of controversy in the board's calculation is the capital value placed on the hereditament in question. This appears to have been arrived at by taking the value of the land as agricultural land at £200 per acre, adding £456 per acre on account of certain natural channels (which made a total of £5,248 for the eight acres) and adding a further sum unspecified for buildings and other structures at double their estimated 1939 cost value. In the view of the board, there was no special fitness in the land apart from the natural channels, and, in particular, the altitude of the intake and consequent benefit of gravity in the conveyance by way of the New River of the water passing through it, was irrelevant.

The valuation officer submitted a valuation giving a net annual value of £677 (rateable value £542) for land covered with water and £228 for land not so covered, making a total net annual value of £905. Apart from the actual valuation of the hereditament in question his calculation proceeded on substantially the same lines as that of the board, except that, in arriving at his capital figure for the entire undertaking, he made no allowance for the increased cost value of buildings and other structures since 1939, so that his figure of capital value came out at £51,392,778 instead of £103,042,380, and the percentage resulting from the application of the cumulo value to his capital value was 3.32 instead of 1.656. His valuation of the hereditament in question was arrived at by taking £50 per acre for the land, adding the estimated 1939 cost value of buildings and other structures, and allowing for the special fitness of the hereditament generally a sum of £10,800 arrived at by what appears to be the somewhat arbitrary method of taking "a capital figure of £35 a yard for the first three hundred and sixty yards of channel instead of an ordinary figure of £5 a yard". The Case Stated thus summarises his views on the subject of special fitness:

"The land was regarded as being fit for its purpose but no fitter than almost all the other land of the undertaking, the intake would be useless without the channels behind it, the whole hereditament in Hertford would be worthless without the other twenty-four miles of New River, the whole

of the New River would be worthless without the filter-beds and reservoirs of Stoke Newington, and those filter-beds and reservoirs would be worthless if mains did not lead to the water taps of the consumers."

The tribunal expressed its conclusions as follows in the Case:

"19. We were of opinion that the question in issue should be determined in accordance with the principle laid down in *Great Central Ry. Co. v. Banbury Union* (1) (73 J.P. 60) that, to quote LORD LOREBURN, L.C.: '... each section is indispensable to the working of the system; and I think the resulting inquiry is, if the whole system were to be let at once, though it be in separate sections, how much of the rent that a tenant would give for the whole is applicable to the particular section which is to be assessed?' We were further of opinion that in estimating the value of the Hertford section of the board's undertaking—to quote LORD SHAW OF DUNFERMLINE in *Metropolitan Water Board v. Chertsey Assessment Committee* (2) (80 J.P. 142): '... land and buildings should be taken account of just as they are, to the eye of a hypothetical tenant—that is to say, with all their advantages, fitnesses, facilities, and capacities'.

20. We came to the following conclusions: (a) The conditional rights, granted under a number of statutes, to take waters from the Thames and the Lea and exercised by the board for the purposes of fulfilling their statutory obligations with respect to the supply of water are rights in gross springing from the statutes and not from the ownership of lands and they are not rateable subjects. (b) The lands with the Chadwell Spring and the well stations to which we have referred are rateable subjects, as also are the various other lands with the buildings, works, fixed plant, mains, etc. which enable the board to take, convey, treat and store water and to distribute it to consumers. (c) The cumulo net annual value of the whole system of rateable subjects comprised in the board's undertaking represents, in principle, the rent which the board, with statutory obligations to fulfil and themselves owning and possessing the rights in gross to which we have referred, might reasonably be expected to pay for that system if they were not the owners. (d) In dealing with the above-mentioned proposals in Hertford and other rating areas there fell to be ascertained a net annual value for each separately rateable hereditament to represent the rent which the board might reasonably be expected to pay for it, subject to a condition that the total of all such net annual values would not exceed, or be less than, the cumulo. (e) The assessment of the hereditament in Hertford must not include the value of the board's statutory right to take water from the River Lea, nor may the actual user of the land or works for purposes authorised by statute be taken into account in arriving thereat, but, in our opinion, there should be taken into account (by way of enhancement of parochial rental values) the inherent advantage and fitness in the Hertford intake and channel which, in conjunction with the New River throughout its length, enables the board to bring to practical account a potentiality, due to altitude, of the waters of the River Lea at Hertford and so to achieve a saving, compared with water from other intakes, of sixty feet of pumping height. (f) It is not practicable to ascertain a net annual value for the hereditament in Hertford truly relative to the agreed rental value of the whole undertaking purely by a process of estimating and comparing respective capital values. Bearing in mind

(1) 73 J.P. 59; [1909] A.C. 78.

(2) 80 J.P. 137; [1916] 1 A.C. 337.

the agreed amount of the net annual value of the undertaking in cumulo and giving effect to our view that the value of the hereditament at Hertford is enhanced by its fitness for assisting the board to achieve the saving in pumping height at Stoke Newington to which we have referred, we decided to place a net annual value of £1,200 with a rateable value of £960 upon the land covered with water and a net annual value (and rateable value) of £300 upon land not so covered. To this extent we allowed the corporation's appeal. The question for the decision of the Court of Appeal is whether in so deciding we came to a correct determination in point of law."

These conclusions are claimed by the board and the valuation officer to be erroneous in law in two respects. First, it is said that, the "profits basis" method of assessment being admittedly applicable, the application of this method involves as a matter of law the ascertainment of the aggregate net annual value of all the indirectly productive hereditaments comprised in the undertaking of the board and the allocation to the indirectly productive hereditaments in each rating area of their due proportion of this aggregate sum, for such ascertainment and allocation are indispensable to the attainment of the essential objects of the "profits basis" method, which are to ensure that the aggregate net annual value attributed to all the hereditaments (directly and indirectly productive) comprised in the entire undertaking does not exceed the cumulo value, and at the same time that, subject to this overriding limitation, the hereditaments (directly and indirectly productive) in each rating area are fairly assessed. It is said further that the proper, if not the only, way of achieving such ascertainment and allocation, so far as indirectly productive hereditaments are concerned, is (to take the instant case) by estimating the aggregate capital value of all the indirectly productive hereditaments in the entire undertaking, applying to that capital value an appropriate percentage which, it is claimed, should be the same as the percentage of the total capital value of the undertaking represented by the cumulo value, and attributing to the indirectly productive hereditament in question a net annual value equal to that percentage of its capital value. It is said that the tribunal in their conclusions did not follow this procedure, and that in failing to do so they committed an error in law. Secondly, it is contended that the tribunal erred in law in regarding the altitude of the hereditament as a factor enhancing its net annual value, or, at all events, in taking such altitude into account as enhancing such net annual value by reason of the actual use made of the hereditament by the board, that being, in the submission of the board and the valuation officer, the effect of the tribunal's conclusions on this point.

As to the first objection, it must be borne in mind that the "profits basis" has no statutory authority, and sets up no new standard of rateable value, the one and only standard (so far as is here material) being the rent at which the hereditament might reasonably be expected to let from year to year on the terms stated in s. 22 (1) (b) of the Act of 1925. The "profits basis" is no more than an aid to the ascertainment of that rent in cases of a particular class. It lays down no inflexible code. The manner of applying its general principles, no doubt, admits of variation to suit the peculiarities of individual cases, and, no doubt, there may be cases in which there are special circumstances sufficing to justify its total exclusion. Nevertheless, the "profits basis" has behind it the sanction of long practice and of judicial approval over many years, and at the present time it may, I think, be said that as a matter of law it is *prima facie* the right method to apply in a case of this kind, the onus of showing special circumstances justifying a departure from it being on those who advocate



such departure: see *Kingston Union v. Metropolitan Water Board* (1), and in particular the speech of VISCOUNT CAVE, L.C., where he says (90 J.P. 70):

"My Lords, it is obvious that, in view of this long practice favourable to the profits basis, those who contend for the application of a different rule undertake a difficult task";

and that of LORD BUCKMASTER where he says (*ibid.*, 73):

"It does not follow that it has ever been laid down that such method is exclusive and must be of universal application. No such principle has, in my opinion, resulted from the decisions, but what does result is that a company undertaking the business of supplying water should prima facie be assessed upon this well-known plan, and it would lead to confusion and endless multiplication of difficulty if this were not done, but as regards a company which, either by reason of its special and peculiar statutory restrictions or by reason of any other fact, cannot be regarded in the same light as that of an ordinary water company, it is open to consider whether other methods of valuation may not properly be adopted. The special facts, however, on which any such alternative method is adopted should be found in the Special Case stated by quarter sessions, in order that it may be considered whether they are adequate to entitle a deviation from a well recognised rule . . . It has been established by more than one authority, that notwithstanding such a fact the method for which the respondents contend can and should be applied, and if the quarter sessions intended to decide otherwise the decision would be wrong. It is at least open to argument that existing circumstances are such as to render the ordinary method of rating inapplicable, but such circumstances must be set out in a Special Case and made the subject of substantive argument before the courts."

As I have said, it is not disputed in this case that the "profits basis" should be applied, and the tribunal regarded it as applicable. But if the "profits basis" is to be applied it follows that the net annual values attributed to all the hereditaments (directly or indirectly productive) must not exceed the cumulo value, and it follows, further, that, in order to achieve this end consistently with a fair apportionment of the cumulo value amongst the hereditaments in the several rating areas, and, in particular, with the attribution of a fair proportion of it to the indirectly productive hereditament here in question, an aggregate net annual value must be placed on all the indirectly productive hereditaments in the undertaking, and a fair proportion of that net annual value must be attributed to this hereditament. There may be other ways of doing this, but the obvious way, and I should have thought *prima facie* the right way, is to estimate the aggregate capital value of all the indirectly productive hereditaments, compute the appropriate percentage thereon in the way contended for by the board and the valuation officer, and take that percentage of the capital value of this hereditament as constituting its net annual value. While saying in para. 20 (d) of the Case that

"In dealing with . . . proposals in Hertford and other rating areas there fell to be ascertained a net annual value for each separately rateable hereditament . . . subject to a condition that the total of all such net annual values would not exceed, or be less than, the cumulo",

and, again, in para. 21 that they have

(1) 90 J.P. 69; [1926] A.C. 331.

"borne in mind the agreed amount of the net annual value of the undertaking in cumulo",

both of which statements are wholly consistent with the adoption of the procedure above described, the tribunal, as I understand their conclusions, have in the end not adopted it, and have given no reason for not doing so beyond the bare statement in para. 20 (f) of the Case stated that

"It is not practicable to ascertain a net annual value for the hereditament in Hertford truly relative to the agreed rental value of the whole undertaking purely by a process of estimating and comparing respective capital values."

I do not follow this. Obviously, if an annual value can be placed on the hereditament in question with all its "advantages, fitnesses, facilities, and capacities" there can be no impossibility in placing on it a capital value duly reflecting the benefit of all such special features. If what is meant is that no capital value which could reasonably be placed on this hereditament would produce an adequate net annual value for it on the application to such capital value (in common with the capital values of all the other indirectly productive hereditaments) of the appropriate percentage, then this seems to me to involve a departure from the normal treatment of indirectly productive hereditaments on the "profits basis" of assessment, without any findings of fact to justify such departure, and I think this does amount to an error in law. The conclusion of the tribunal on this point invites the inference that, notwithstanding their very proper statement in para. 20 (e) of the Case Stated to the effect that the actual user of the hereditament by the board for purposes authorised by statute should not be taken into account, they have in fact made some addition to the annual value of the hereditament which is not attributable to the hereditament itself but is attributable to the specially advantageous use in fact made by the board of this hereditament in conjunction with the other parts of its undertaking, by reason of the altitude of the intake from the River Lea and the consequent saving in pumping costs in respect of water derived from that source. This would be clearly wrong, as appears from *Metropolitan Water Board v. Chertsey Assessment Committee* (1), but the inference that the tribunal may in the end have done it is supported by the latter part of para. 20 (e) of the Case Stated.

I have to some extent anticipated consideration of the second objection in dealing with the first. The question how far, if at all, the altitude of the hereditament should be taken into account in ascertaining its value must be answered in accordance with the principles stated by the House of Lords in the case just cited of *Metropolitan Water Board v. Chertsey Assessment Committee* (1). In reading the speeches in that case, it must be borne in mind that the price actually paid for the land there in question, and the amount actually expended in the erection of buildings on it, were proved, and that their Lordships' observations were in part directed to the question (which they answered in the affirmative) whether such price and cost did not automatically include all elements of special fitness proper to be taken into account, so that all that remained to be done was to apply the appropriate percentage to those figures. Here the actual figures of price and cost are not available, so that a proper estimate of the value of the hereditament with all its "advantages, fitnesses, facilities, and capacities" (to quote again LORD SHAW OF DUNFERMLINE's phrase in the *Chertsey* case (1) (80 J.P. 142) must be made de novo. Nevertheless, much of what was said by their Lordships in the *Chertsey* case (1)

(1) 80 J.P. 137; [1916] 1 A.C. 337.

is, I think, directly in point. EARL LOREBURN said (*ibid.*, 139):

"When these parties accepted cost price of some years ago as the basis, they might reserve a right to say that the land had become saleable for more money now by reason of a rise in prices or by reason of minerals having been found on it, if such had been the case, or of something else inherent in the land itself. But how could they say that something should be added either to the capital value or the annual value by reason of such things as its proximity to the river or its special fitness for some industrial purpose? All this had been included in the cost price. Or why should anything be added 'in respect of the user made of the intake', a phrase of which I do not grasp the meaning, beyond seeing clearly that this is not a rateable subject at all? Or how can it be said that anything should be added because the person who bought the land or who now owns it has a statutory right, personal to himself, of using it in a particular way, and drawing water through it from the Thames? For that does not make the land itself more valuable. It only makes the owner or occupier of it more able to make profits. You might as well say that a piece of land is more valuable because the tenant of it has a valuable patent which he works on the land."

LORD ATKINSON after referring to a number of authorities and, in particular, citing with approval *Reg. v. Mile End Old Town* (1), and *Reg. v. West Middlesex Waterworks* (2), said (*ibid.*, 140):

"The contention of the respondents is that it is not merely the adaptability of the land for the purposes to which the appellants or their predecessors were empowered by statute to devote it which is to be taken into account, but the actual use of it when acquired and devoted to that purpose, almost as if their statutory powers, when put in action, were a rateable hereditament. The value of the user of the lands for the purpose authorised might be enormous. It might be estimated by the profits made by the sale of the water taken into their reservoirs and distributed in altogether different taxable areas. And it would appear to me that the struggle of the respondents in the present case is, in fact, a struggle to get these works valued to some extent on the basis of receipts or profits made in a parish or parishes different from that in which the works to be valued are situated. It is urged on behalf of the respondents that the decision of the Court of Appeal in the case of *New River Co. v. Hertford Union* (3) is an authority in support of their contention, and much time was spent in the minute criticism of the judgment delivered by the Master of the Rolls in that case. If this be so, the decision is entirely out of harmony with a current of authority extending from the year 1847 down to the year 1914, and as the case is not a binding authority on this House, I would for myself say unhesitatingly that I decline to follow it; but it is perfectly plain to me that, correctly understood, the case is in entire harmony with the weighty authorities which preceded it, and gives no support whatever to the respondents' contention. No doubt, in the language employed by the learned lords justices, the distinction between the actual use and fitness for that use is not steadily kept in view, but the conclusion to which the reasoning of the judgment of the then Master of the Rolls leads up is succinctly stated by him at the end of his judgment

(1) (1847), 11 J.P. 505.

(2) (1859), 23 J.P. 164; 1 E. & E. 716.

(3) 66 J.P. 724; [1902] 2 K.B. 597.

in these words (66 J.P. 726): 'I think the standard of structural value is not the true one to apply to such a case. There is an added element of value in this case by reason of the special fitness of the land for a particular profitable purpose'. That statement of the law is entirely consistent with the earlier authorities, and it is clear, I think, that the learned Master of the Rolls never intended to cover by the words 'special fitness' the actual user of the land or works for the authorised purposes."

The same learned lord (after referring to *Talargoch Mining Co. v. St. Asaph Union* (1)) said (*ibid.*, 141):

"This is the case upon which the Master of the Rolls based his judgment. It is a clear and emphatic authority that it is the adaptability, or special fitness, of a hereditament for the purpose to which it is to be put, and not its actual user for that purpose, that is to be taken into account as enhancing its value. The *Hertford* case (2), therefore, so far from being an authority in favour of the respondents' contention, is, like every other case which has been cited, in truth and fact a direct authority against it. In my opinion the contention is hopelessly unsound."

LORD PARKER OF WADDINGTON said (*ibid.*, 143):

"My Lords, great stress was laid by the respondents' counsel on the *Hertford* case (2), which they maintained was an authority to the effect that in applying the rule something must be added to 'value as land' and 'structural value'. I confess I have been unable to follow the reasoning of the learned judges who decided the *Hertford* case (2), but if and so far as it supports the proposition for which it is cited I cannot think it is good law. I am inclined to think that it is based on the same confusion of thought to which I have already referred. My Lords, the order of the Divisional Court, approved by the Court of Appeal, in this case is open to the same criticism. It expresses an opinion that in assessing the rateable value of the hereditaments in question there is, in addition to structural value and value as land, an element of value to be taken into consideration by reason of, *inter alia*, its proximity to the river and its special fitness for the purposes therein mentioned. If this only means that in valuing a hereditament you must take into account its position and its fitness or adaptability for all purposes for which it can be used, including that for which it is used, it is obviously correct, but taken in connection with this case its meaning really is that in applying the empirical rule you have to add something to the usual percentages on the cost of the land and of the structure, which, for the reasons I have stated, appears to me to be wrong. My Lords, the order of the Divisional Court refers also to an additional element of value by reason of the 'user' made of the intake and the statutory right of the appellants to take water from the River Thames by means thereof. In these respects also the order is, in my opinion, wrong. It is true that in the *Hertford* case (2), COLLINS, M.R., mentions the 'user' of the hereditament in question as an element of value, but it appears that he employed this expression as meaning 'fitness for the purpose for which the hereditament was actually used'. In this sense the 'user' can legitimately be taken into account as an element of value, but the fact that any particular use is made of a hereditament is not otherwise material to its value. Again, the right of the appellants to take water from the River Thames being a right in gross and not

(1) (1868), 32 J.P. 501; L.R. 3 Q.B. 478.

(2) 66 J.P. 724; [1902] 2 K.B. 597.



appurtenant to the land, or passing with the land to any owner or occupier thereof, cannot enhance the value of the land. I do not think that the *Hertford* case (1), if it decides otherwise, can stand. So far as any statutory power of the appellants is relevant at all, it has already been taken into account in treating the appellants with their statutory powers as a possible tenant of the hereditament in question and proceeding to apply the rule on this footing. Moreover, even if either of these points were proper to be taken into account as a matter of valuation, this would be no reason for treating them as elements the value of which ought to be added when the annual value had been ascertained by an application of the rule."

Applying these observations to the present case, I think it follows that, in estimating the capital value of the hereditament by reference to which the hypothetical rent is to be calculated, it is right to take into account all such characteristics inherent in the hereditament itself as make it specially fit for the purpose for which it is actually used by the board, that being the purpose for which the board as hypothetical purchaser or tenant would presumably be seeking to buy or rent it. That purpose being the taking of water from the River Lea and passing it into the New River, the proximity of the hereditament to the River Lea and the New River and the presence on it of natural channels facilitating the passing of water from the one to the other are obviously characteristics which make it specially fit for the purpose in view. The relevance of altitude to the special fitness of the hereditament as such is less obvious. Altitude absolutely considered is of little materiality. It is only of importance when regarded in relation to the lay-out and levels of other parts of the board's works. But (as appears from the *Chertsey* case (2)) the actual value to the board of the use to which the hereditament is actually put must not be taken into account. It is thus not legitimate to attribute (as the corporation in effect claimed should be done) a special value to the hereditament on account of the altitude of the intake, measured by reference to the pumping costs saved by the board by passing the water received through the intake into the New River and along it by gravity to the filter-beds at Stoke Newington, whence it can be distributed (still by gravity) to the consumers in certain relatively low lying parts of the board's area. The amount of the water in fact received by the board through the intake, and what is in fact done with it by the board after it passes from the hereditament into the New River, are alike circumstances irrelevant to the value of the hereditament for the present purpose. They are in no sense elements of special fitness inherent in the hereditament itself, any more than the advantage the board in fact takes of the relative altitudes of the intake, the Stoke Newington filter-beds, and the premises of the consumers supplied by the latter. Accordingly, I am of opinion that the altitude of the hereditament is only relevant to the extent that, considered as one of the characteristics of the hereditament in point of situation, it makes the hereditament better suited to the board's purpose of taking water from the River Lea and passing it into the New River in the general sense that it is more advantageous to a water undertaking to take water into their system at a high rather than a low level. In the result, therefore, I should describe the altitude of the hereditament as, in effect, relevant only in the sense that it narrows the range of hereditaments on the River Lea from which the board, seeking hereditaments on the River Lea for the purpose in view, would be likely to make its selection, and, by narrowing the range, increases to some extent

(1) 66 J.P. 724; [1902] 2 K.B. 597.

(2) 80 J.P. 137; [1916] 1 A.C. 337.

the price which the hypothetical vendor would be likely to require, and which the board might reasonably be prepared to pay. It would be wrong, in my view, to measure this increase by reference to the loss the board would sustain if deprived of the advantageous use it, in fact, makes of the water received through the intake by reason of the lay-out and relative levels of other parts of its system.

Counsel for the board said that he was in this court bound to admit that (as mentioned by SIR RICHARD HENN COLLINS, M.R., in *New River Co. v. Hertford Union* (1) (66 J.P. 726) the point at which the board takes water from the River Lea is fixed by statute, nor (I think) did he, or could he in this court, dissent from the observation of SIR RICHARD HENN COLLINS, M.R. (ibid.), that this point "is presumably the point best adapted to their needs". That observation seems to me adequately to cover every element of special fitness inherent in the hereditament in point of situation, including, for what it is worth, the element of altitude.

The tribunal have not made it clear to what extent they have taken altitude into account, but in the final paragraph of the Case they say that they have given effect to their view that the value of the hereditament "is enhanced by its fitness for assisting the board to achieve the saving in pumping height to which we have referred". This seems to me to indicate that the tribunal have taken into account the advantageous use in fact made by the board of the altitude of the intake in conjunction with the lay-out and relative levels of other parts of their works, and for the reasons I have endeavoured to state I think this involves an error in law.

Accordingly, I would remit the case to the tribunal with directions: (i) unless they are of opinion that there are special circumstances justifying a different course, to ascertain the net annual value of the hereditament in accordance with the procedure indicated in this judgment; (ii) if they are of such opinion, to find and state the facts constituting the special circumstances on which their opinion is based, and to indicate the procedure they have adopted in ascertaining the net annual value of the hereditament; and (iii) to make such revision in their valuation as they find necessary having regard to the above directions and to the observations contained in this judgment as to the extent to which the altitude of the hereditament may properly be taken into account. Given a correct application of principles, the figures are, of course, entirely a matter for the tribunal. So is the percentage to be applied to capital value, though as to this latter point the parties seem to be agreed as to the way in which the percentage should be arrived at, and, as I have said above, that seems to me to be *prima facie* a proper way of arriving at it.

*Appeals allowed.*

Solicitors: *R. H. McDowell* (for the Metropolitan Water Board); *Sharpe, Pritchard & Co.*, agents for *Longmores*, Hertford (for Hertford Corporation); *Solicitor of Inland Revenue* (for the valuation officer).

F.G.

## HOUSE OF LORDS

(LORD NORMAND, LORD OAKSEY, LORD MORTON OF HENRYTON, LORD REID AND LORD COHEN)

Feb. 16, 17, 18, 19, 23, Apr. 20, 1953

## INLAND REVENUE COMMISSIONERS v. CITY OF LONDON CORPORATION (AS THE CONSERVATORS OF EPPING FOREST)

*Income Tax—Income—“Annual payment”—Statutory liability to contribute to upkeep of forest—Amount of contribution ascertained by reference to excess of conservators’ expenditure over other income—Right of contributor to deduct tax and of conservators to recover it—Income Tax Act, 1918 (8 and 9 Geo. 5, c. 40), sched. D, Case III, r. 1 (a).*

The Epping Forest Act, 1878, s. 3, provided for the regulation of Epping Forest by the corporation of the city of London as the conservators of Epping Forest. By s. 39, the Act provided that the corporation should from time to time contribute “such moneys as shall be necessary” to the capital and income of the Epping Forest fund from which the expenses of the conservators were to be defrayed. In every year since 1878, the receipts of the fund, apart from the contribution of the corporation, were insufficient to defray expenses, and the corporation in each year transferred to the fund a sum equal to the deficiency. In 1948-49 the deficiency was £16,006 3s. 4d. which the corporation met by a payment (after deduction of income tax) of £8,803 7s. 10d. The conservators claimed to recover £7,202 15s. 6d. from the Crown as the amount of tax deducted. It was agreed (i) that the conservators were a separate persona from the City of London Corporation; (ii) that the contribution by the corporation was paid wholly out of profits or gains on which the corporation had paid income tax; and (iii) that the conservators were a body established for charitable purposes only, and, therefore, exempt from income tax on annual payments forming part of their income.

**HELD:** on the true construction of s. 39 of the Act of 1878 the duty of the corporation was not to discharge the debts of the conservators, nor to pay a mere “balancing” sum in the nature of a trade receipt against which must be set expenses, but to make contributions to supplement the income of the conservators; these contributions were “pure income profit” and were, therefore, “annual payments” made by the corporation to the conservators within the meaning of r. 1 (a) of Case III of sched. D to the Income Tax Act, 1918; and the conservators were entitled to recover the tax deducted by the corporation.

*Lincolnshire Sugar Co., Ltd. v. Smart* ([1937] 1 All E.R. 413) and *Pontypridd & Rhondda Joint Water Board v. Ostime* (1946) (110 J.P. 281), distinguished.

**APPEAL** by the Crown from an order of the Court of Appeal dated May 29, 1952, reversing an order of DONOVAN, J., dated Dec. 21, 1951, and affirming the determination of the Special Commissioners of Income Tax. The Special Commissioners held that payments made by the corporation of the city of London to themselves as conservators of Epping Forest, under the Epping Forest Act, 1878, s. 39, constituted “annual payments” within the Income Tax Act, 1918, sched. D, Case III, r. 1 (a), and that, in the circumstances, the conservators were entitled to receive repayment of tax deducted from the payments by the corporation.

*The Attorney-General (Sir Lionel Heald, Q.C.), Cyril King, Q.C., and Sir Reginald Hills* for the Crown.

*Millard Tucker, Q.C., Mustoe, Q.C., and R. R. D. Phillips* for the Conservators of Epping Forest.

The House took time for consideration.

Apr. 20. The following opinions were read.

**LORD NORMAND:** My Lords, the appeal arises out of a claim by the respondents for exemption from income tax for 1948-49 under the Income Tax

Act, 1918, s. 37 (b), and for recovery from the Inland Revenue of £7,202 15s. 6d., which had been deducted (professedly under r. 19 (1) of the All Schedules Rules), by the mayor and commonalty and citizens of the city of London in paying to the respondents a contribution under the Epping Forest Act, 1878, s. 39 (1), for the year ended Mar. 31, 1949, of £16,006 3s. 4d. The Court of Appeal decided in favour of the respondents, reversing a judgment of DONOVAN, J., and re-affirming the determination of the Special Commissioners. Against the decision of the Court of Appeal, this appeal is taken by the appellants, the Inland Revenue Commissioners.

The substantial question is whether the contribution paid to the respondents is an "annual payment" within the meaning of Case III of sched. D. Under r. 1 (a) of the Rules Applicable to Case III, income tax extends to

"any interest of money . . . or any annuity, or other annual payment, whether such payment is payable . . . either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods."

If the payment of the contribution falls within the words "annual payment", it follows on the facts of the case that the respondents are entitled under r. 19 (1) of the All Schedules Rules, on making the payment, to deduct and retain a sum representing the amount of the tax thereon at the rate in force during the period when the payment was accruing due, and, further, that the Conservators of Epping Forest, the respondents, can recover from the Inland Revenue the amount of the tax deducted. These consequences inevitably follow from these findings which are now common ground: (i) that the conservators, the recipients of the sum, are a separate legal persona from the City of London Corporation which pays them, though the members of the two bodies are the same; (ii) that the contribution was paid wholly out of profits or gains on which the corporation had paid income tax; and (iii) that the conservators are a body established for charitable purposes only, and, therefore, exempt from income tax on "annual payments" forming part of their income.

In June, 1871, the Court of the Common Council of the Corporation of the City of London met the First Commissioner of Works and offered to abandon certain ancient rights of metage on grain and wares brought into the Port of London and to devote the revenue arising from a fixed duty, which it was proposed should be levied in lieu of metage, to the preservation of Epping Forest for the benefit of the public at large. This offer was voluntary, and it was accepted. In pursuance of this arrangement, an Act was passed in 1872 abolishing compulsory metage, and creating a fixed due called the "City of London Grain Duty". This Act also created a fund to be applied to the preservation of open spaces near London. In the meantime, an inquiry was proceeding in order to ascertain what illegal enclosures had been made in the previous twenty years. There were legal proceedings for the purpose of staying further illegal enclosures and for the purpose of obtaining a declaration that all owners and occupiers of lands and tenements within the regard of the forest were entitled to rights of common pasture and pannage over the whole waste land of the forest. These legal proceedings, in which the City Corporation took a part, were successful. Thereafter, the corporation acquired by voluntary purchase the waste lands of certain manors in the forest. The next step was the introduction by the government of the day, by arrangement with the corporation, of a Bill which became the Epping Forest Act, 1878. It



should also be mentioned that the corporation's interest in the preservation of open spaces for the benefit of the public was not confined to Epping Forest. That was, however, much the largest of the open spaces which the corporation was anxious to preserve.

The Act of 1878 is entitled

"An Act for the Disafforestation of Epping Forest and the preservation and management of the unclosed parts thereof as an Open Space for the recreation and enjoyment of the public; and for other purposes."

It recites with much detail the steps which had led to its enactment. From these recitals I quote the following:

"Whereas the Corporation of London have made great exertions to preserve the Forest as an open space for the recreation and enjoyment of the public, and for that purpose they have purchased and hold a large proportion of the waste lands, and have expended large sums of money . . . And whereas the Corporation of London are desirous of being constituted Conservators of the Forest, and are willing and able to defray such expenses as are to be borne by the Conservators."

Section 3 of the Act provides that Epping Forest shall be regulated and managed under and in accordance with the Act by the Corporation of the City of London, acting by the mayor, aldermen and commons of the City in Common Council assembled, as the Conservators of Epping Forest. Section 7 requires the conservators at all times to keep the forest unenclosed and unbuilt on, as an open space for the recreation and enjoyment of the public, and, *inter alia*, to preserve as far as possible the natural aspect of the forest, ancient remains within it, and its natural amenities. There are provisions (s. 30) providing for the appointment of verderers, and (s. 31) of a committee, of which the verderers are *ex officio* members, with authority to exercise the powers of conservators. The powers and duties of the conservators are set out (s. 33), and are designed to give the conservators authority and power to manage the forest in order, *inter alia*, to safeguard and improve the forest as a place of public resort and enjoyment, and they include powers to set apart such parts as they think fit for the use of the inhabitants to play at cricket and other sports, and to lay out cricket grounds and grounds for other sports, and to enter into agreements with, and to confer special privileges on, particular clubs or schools, and powers to set apart and maintain bathing places. The obligation of the Corporation of London to contribute is dealt with in s. 39. The material provisions of the section are:

"(1) The Corporation of London shall from time to time contribute to the capital and income of a fund, to be called the Epping Forest fund, such moneys as shall be necessary out of the City of London grain duty or from other sources. (2) The fund shall consist of—As regards capital: . . . As regards income: . . . (iv) The annual income arising from the investments of any money, part of the capital of the fund: (v) The half-yearly or other periodical payments in respect of rentcharges: (vi) All fines, penalties, proceeds of timber-cuttings and loppings, and other moneys received by the Conservators, other than capital as aforesaid: (vii) The fees and income received for marking the cattle of the commoners, and in respect of cattle and animals impounded: (viii) All moneys contributed by the Corporation of London, or by any person, to the income of the fund."

It should be explained that the City of London grain duty referred to in

s. 39 (1) came to an end in 1902, and that the contributions to the Epping Forest fund have since then been provided out of the city's cash, the income of which consists of the profits from the corporation's estates and markets and certain investments, all of which, in the hands of the corporation, are brought into computation for income tax purposes. In every year since the Act of 1878 became law, the other receipts of the Epping Forest fund have been insufficient to defray the expenses of the conservators and the corporation has in each year transferred to the fund a sum equal to the deficiency. The burden had been increasing and this fact, no doubt, moved the corporation for the first time to deduct income tax in the year in question when it made the payment. The chamberlain of the City of London is the banker of the corporation and he is also treasurer of the Epping Forest fund. Bills are presented through the Epping Forest committee and are examined by the accountant auditors, and a cheque or warrant is drawn on the chamberlain in payment. As regards the wages of the forest staff, an account is kept by the superintendent of the forest, which the Epping Forest committee keeps in funds by means of warrants drawn from time to time on the chamberlain. The accounts of income and expenditure are gone through monthly, and at the end of the year the amount of the corporation's contribution from the city's cash necessary to make up the deficiency between the income and expenditure of the year is finally determined. Payment is made, in account, by the chamberlain as banker and he makes the necessary transfer in his books from the city's cash account to the Epping Forest account. In 1948-49, the expenses were £22,660 19s. 2d., the receipts (other than the respondents' contribution), £6,654 15s. 10d. The deficiency was £16,006 3s. 4d., which was met by a net payment (i.e., a payment after deduction of income tax), in account, of £8,803 7s. 10d. This payment was made on the footing that the respondents were entitled to recover the tax deducted, amounting to £7,202 15s. 6d. from the appellants.

The Special Commissioners give their reasons and conclusion in the following paragraphs:

"In our opinion, once it is conceded that the corporation's contributions to the Epping Forest fund are properly regarded as payments (in account) to a separate body of persons (namely, the conservators), the proper view of s. 39 and s. 41 of the Epping Forest Act, 1878, is, not that the corporation discharges debts of the conservators, nor that it pays a mere 'balancing' sum in the nature of a trade receipt against which must be set expenses, but that it makes contributions to the income of the conservators, and that, out of their independent income and these contributions, the conservators discharge their own debts. In other words, we think a reasonable interpretation of these sections is that the corporation is required to supplement the income of the conservators, so as to ensure that such income, so supplemented, shall be sufficient to enable the conservators to meet all expenditure on revenue account incurred in the performance of their statutory duties. A sum payable (albeit out of capital) under a will to supplement the income of an individual is itself 'income' (*Brodie v. Inland Revenue Comrs.* (1)) and in this respect we see no difference in principle between this and a sum payable (out of revenue) under a statute to supplement the income of a body of persons. The question then arises whether this 'income' has the characteristics of an 'annual payment'. The fact that the annual amount is not fixed but variable is immaterial. The sums in question are legally exigible, they have the quality of recurrence, and,

(1) (1933), 17 Tax Cas. 432.

in our opinion are a 'pure income profit', as distinct from sums in the nature of trade receipts against which have to be set the expenses of earning them. We therefore hold that the contributions are 'annual payments' made by the corporation to the conservators."

DONOVAN, J., agreed with the Special Commissioners in the proposition that the respondents do not discharge the conservators' debts, but he found that the Special Commissioners' reasoning was fallacious because it assumed that, if a sum is paid by one person to supplement the income of another, the supplement is necessarily "profit income" in the hands of the recipient. He thought that the test was whether, on the facts as a whole, the contribution paid by the respondents was an item of revenue against which expenses must be set to determine whether the conservators had made a profit. He said:

"The conservators get a sum only because they have performed duties which involve them in an outlay of equivalent amount. If the charitable exemption were abolished, I think the conservators would be astonished if the Inland Revenue descended upon them and said 'Never mind about your expenses, the £16,000 is all profit: pay tax on it'."

SIR RAYMOND EVERSHED, M.R., who delivered the judgment of the Court of Appeal, rejected the test of DONOVAN, J. In his view

"... the vital element is that the enterprise which the conservators manage and conduct is a charitable enterprise to be regarded in the same way as any other charitable enterprise conducted with charitable funds by charitable trustees. The conservators are not carrying on a trade; and in spite of references in the argument, naturally enough, to 'subsidies' and 'balancing figures', the enterprise which the conservators conduct is, in our judgment, nothing like a trade. The question, therefore—What if a profit were made?—seems to us not really capable of being sensibly asked. For, by the statute, every penny piece of income must be applied for the purposes (being charitable purposes) of the forest and no other purposes, and the corporation's obligation is by the statute to pay what is required to provide for the year's expenses and no more. There is, thus, no real question or possibility of the conservators so conducting the affairs of the forest as to result in the production of 'profits or gains' within the meaning of the Income Tax Acts."

Again, the learned Master of the Rolls says:

"... it is of the essence of the matter that the conservators are engaged upon a charitable purpose."

And yet again:

"... it seems to us that the learned judge treated the operations of the conservators as being of a quasi-trading character or of a character capable of producing 'profits or gains'... For the reasons which we have given it is upon this matter that we have formed a different view. It does not seem to us irrelevant (as the judge thought) whether the conservators could be thought of as carrying on a trade or not. It is, in our judgment, of the essence of the matter that they do not do any such thing."

In my view, these passages make it clear beyond any doubt that the Court of Appeal decided the question, annual payment or not, on the ground that the conservators, being a body constituted for charitable purposes only and

bound to apply their whole income to those purposes, were incapable in law of earning profits within the meaning of the Income Tax Acts, with the corollary that their accounts were not such as that

“the idea of an annual profit and loss account in respect of the year's operations was applicable.”

My Lords, both in the judgment of DONOVAN, J., and in the judgment of the Court of Appeal, reference was made to the well-known judgment of SCRUTTON, L.J., in *Earl Howe v. Inland Revenue Comrs.* (1), and to the judgment of LORD GREENE, M.R., in *Re Hanbury* (2). In the first of these authorities, SCRUTTON, L.J., pointed out that if someone agrees to pay his butcher an annual sum for meat, the whole sum is not profit of the butcher. To find how much of the annual sum is profit, the butcher must deduct the cost of the meat. In his hands the sum paid is a gross receipt, not an annual payment under Case III. In *Re Hanbury* (2) LORD GREENE, M.R., distinguished two classes of annual payments—one which the Income Tax Acts regard as “pure profit income” of the recipient, which is not diminished by any deduction, and which the payer is entitled to treat as a payment which goes out of his income altogether, and the other, a number of annual payments the very quality and nature of which makes it impossible to treat them as pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are.

The judgment of the Court of Appeal, after a timely reminder that the court must construe the Act itself and not a judicial paraphrase of it, expresses the opinion that DONOVAN, J., was misled by the words in the formula of LORD GREENE, M.R., “pure profit income”, into placing an undue emphasis on the word “profit” in its business sense. I do not think that DONOVAN, J., fell into any verbal trap or that his reasoning is vitiated by giving a false emphasis to the word “profit”. I respectfully think that he addressed himself to a real and not a verbal distinction, whether the sum received by the respondents was an item of revenue or receipt in their hands against which their expenses have to be set, or whether it was income in their hands. It is not possible, and I think I would have the assent of every one to this, to state the issue in a short and tidy formula, which shall have regard equally to the character of the payment from the payer's position and from the payee's position. But LORD GREENE's formula, which would, perhaps, lose nothing by the omission of the words “pure profit” states the position, at any rate from the point of view of the payee, in terms which are not misleading, and I see no reason for thinking that the problem was not understood by DONOVAN, J.

The ratio of the decision of the Court of Appeal was, we were told, not among the reasons put forward by the respondents in that court, nor does it appear among the reasons in their Case. It was not supported by counsel for the respondents, and I must, with understandable regret, admit that a ratio, which would afford a short and clear-cut solution of our problem, is scarcely in line with the ratio of previous decisions of this House. It is, indeed, much too late to say that a charitable body, every penny of whose income must be applied to its exclusively charitable purposes, is incapable of earning profits or gains. I do not know how to reconcile this with *Brighton College v. Marriott* (3), where the surplus earned by a charitable body in carrying on its trade of education was held to be subject to tax though the surplus was dedicated to

(1) [1919] 2 K.B. 336.

(2) (1939), 20 A.T.C. 333.

(3) [1926] A.C. 192.



the charitable purposes of the college. It is true that, in my opinion, the respondents were not carrying on a trade as defined in the Income Tax Act, 1918, s. 237, i.e., a trade, manufacture, adventure or concern in the nature of trade. But the activities they were carrying on are fairly within the category "analogous to trade", and if they had resulted in a surplus, the surplus would be profits and gains under sched. D, Case VI, though it could only be applied for purposes which exclude "personal profit", to use the words employed by VISCOUNT DUNEDIN in *Forth Conservancy Board v. Inland Revenue Comrs.* (1). That case was not concerned with a charity, and the conservancy was not carrying on a trade or a concern in the nature of a trade and was not liable to tax under Case I of sched. D. But it was carrying on an enterprise "analogous to trade", and the dues it was entitled to levy exceeded its outgoings. The surplus was held to be subject to tax under Case VI. LORD DUNEDIN would have held, but for authority, that it was not liable to tax because:

"Not a penny of the dues . . . can be employed for any other purposes except only for the necessary expenses of the trust. No one makes a personal profit out of any of the moneys received."

But LORD DUNEDIN conceded that he was bound by the authority of *Mersey Docks & Harbour Board v. Lucas* (2), in which

"it was most definitely laid down in this House that the purpose to which the money collected was applied could not be considered in settling whether it was a gain or profit, or not."

Now, the conservators in the present case might have had a surplus in some one year apart from any contribution by the corporation of the City of London. That may have been improbable, but it was not impossible. They would not then, of course, have been entitled to any contribution from the corporation. The surplus would have been available in the next year or later for the charitable purpose of preserving the forest as a public resort, but it would none the less have been a profit within the meaning of the Income Tax Act, sched. D, Case VI. The question whether it would have been exempted from the liability to tax is a different question; that depends on the scope of the exempting provisions of the Income Tax Acts, which themselves necessarily pre-suppose a profit that without them would be taxable. The result is that if the decision of the Court of Appeal is to stand, it must be supported by reasons other than those given in the judgment. The other reasons must show that, though the respondents may be regarded as carrying on an activity which might render a resulting surplus taxable under Case VI, they also received the sum in question as income within Case III, a sum, therefore, that does not come into the reckoning of its Case VI profits, but remains taxable separately under Case III without any deduction. That is a situation that the Income Tax Act contemplates and for which it has made provision.

The convenient course will be to turn to the other grounds which were put forward on the respondents' behalf. The case in outline is as follows. The payment in question is an annual payment hardly distinguishable from an annuity. The matter has to be looked at both from the payees' point of view and from the respondents' point of view. Regarded as a payment, it is a sum paid under a legal obligation, and it makes no difference that the obligation is statutory and not under covenant. It has the characteristic of recurrency. It is true that unlike an ordinary annuity it fluctuates from year to year, but that is

(1) 95 J.P. 160; [1931] A.C. 540.

(2) (1883), 48 J.P. 212; 8 App. Cas. 891.

immaterial: *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (1). It is paid wholly out of taxed money, and it is a transfer of part of the income from the payee with its tax burden: *Perkins' Executor v. Inland Revenue Comrs.* (2). It is calculated by reference to a rule prescribed in the Epping Forest Act, 1878, s. 39 (2), but

"there is no relation between the measure that is used for the purpose of calculating a particular result and the quality of the figure that is arrived at by means of the test: *Glenboig Union Fireclay Co., Ltd. v. Inland Revenue Comrs.* (3)."

It cannot reasonably be regarded as payment for services rendered or for any consideration of any kind. Regarded as a receipt, the respondents take it as a sum at their own disposition to expend just in the same way as interest on their investments or rents received by them, and the fact that it was, or even had to be, expended in payment of debts incurred in the performance of their duties is irrelevant. Many of these propositions are not in dispute. The controversy, indeed, settled down on the question whether the sum is income in the hands of the respondents. On this, the Crown submitted that it was a balancing item in the respondents' profit and loss account, or an account of the nature of a profit and loss account. This account was kept in accordance with the provisions of the Epping Forest Act, 1878, s. 39 (2), which stamped the payment with the character of a trade receipt. Moreover, the payment only filled up a deficit and it could, therefore, unlike the sum paid to shareholders in *Moss' Empires, Ltd.* (1), never be a profit in the pocket of the recipient. Apart from that it was a payment in return for the performance of the duties laid on the recipients by the Epping Forest Act, 1878, and in effect a payment in discharge of debts thereby incurred and not income or pure profit in the hands of the respondents.

My Lords, it is evident that the decision of the appeal, subject to the effect of the authorities, largely hinges on the proper construction of the Epping Forest Act, 1878, and especially of s. 39. But in view of the Crown's contention that the payment was made in return for services or some advantage received by or on behalf of the corporation, it is necessary to recall the circumstances antecedent to the passing of the Act, and those recitals of the Act which I have quoted. I will deal with this aspect of the Crown's case first. It may in limine be said that there is no finding that the corporation received any consideration, or money's worth in any form, in return for the payment, but I go further and say that no such finding could have been made consistently with the evidence laid before the commissioners and accepted by them. In the first place, it seems necessary to repeat that the whole actions of the corporation which led up to the passing of the Act were disinterested, and sprang from a desire to preserve this forest, among other open spaces, for the benefit of the public. That was the motive which induced the corporation to undertake the obligation and to agree to have it embodied in the statute. But satisfaction of a motive must not be confused with consideration. To come to the Act itself, the duties laid on the respondents were duties which they owed to the public, not to the corporation. In view of some of the argument addressed to us, it may be well to add that the public, who are the beneficiaries of the Act, are the public at large, and that the sparse dwellers among the offices, warehouses and public buildings in the city of London are today

(1) [1937] 3 All E.R. 381; [1937] A.C. 785.

(2) (1928), 13 Tax Cas. 851.

(3) 1922 S.C. (H.L.) 112.

but a microscopic part, and even in 1878 must have been only a small proportion, of those who enjoy the open spaces of Epping Forest. I dismiss as a fantasy the notion that the corporation was in some way, direct or indirect, the beneficiary of the respondents' performance of their duties, and that the sum has the quality of a payment for services or the like.

I turn next to examine the question whether s. 39 imparts to the sum the character of a trade receipt in a kind of profit and loss account. Now, in my opinion, the character of the payment cannot depend on the place which it takes in the account even though that account is statutory. The account does not bind the Inland Revenue when it comes to assess the taxable income of the respondents. Nor are the respondents bound by the account in their discussions with the Inland Revenue. The question between them is whether the sum ought to be dealt with as a trade receipt or an item of that nature in an account properly framed to arrive at the taxable profit of the respondents, assuming them to have been carrying on a trade (Case I) or some enterprise analogous to a trade (Case VI), or whether it ought to be dealt with as a Case III profit or income. We cannot advance towards a decision merely by asking how the accounts of the respondents have been framed, or how they must be framed under their statute. But, secondly, this contention of the Crown is, in my opinion, based on a misconception of s. 39. The first sub-section creates the obligation to contribute to the capital and income of the Epping Forest fund "such moneys as shall be necessary". The question immediately occurs: How measure what is necessary?, and the answer is found appropriately in the immediately following sub-section. It provides the measure of what must be paid to the income of this fund. I do not attach any importance to the description "income" in s. 39 for the reasons already explained, that the use of such a word in the statute or in the account cannot affect the issue. Nor do I attach the least importance to the fact that the sum is a balancing figure. It is that, of course, but the purpose of coming to a balance is merely to measure what is "necessary". It is to be noted, moreover, that among the credit figures in the account are the income from investments and payments of rentcharges, which are not of the nature of trade receipts.

My Lords, a reading of the recitals and of the Act convinces me that the approach of the Crown's argument to the issue is faulty and involves a perverted view both of the duties of the respondents and of the means at their disposal to achieve the purposes for which the Act was passed. From the first, the respondents had large duties thrust on them, duties which might be discharged in a niggardly, penurious way, or in a generous and liberal way. They had a very small income apart from the corporation's contribution. Without that contribution they would have been able to do little to achieve the purpose of the Act. They certainly could not fulfil that purpose unless they had at their command an income on a scale which would enable them to follow a policy for the management of the forest involving a certain magnitude of expenditure. It was there that the corporation were willing to help, not by defraying the annual debts, or part of them, incurred by the conservators, but by giving the assurance, under sanction of statute, that the conservators would have an income of the order required for their task. Since the members of the corporation were also the conservators, there was a practical safeguard against the burden thus assumed becoming unmanageable. That is my reading of the Act, and it is worth noticing that s. 39 (viii) contemplates the possibility that persons other than the corporation would contribute to the income of the fund. What can this mean except that other persons might desire, like the

corporation, to contribute recurrent gifts of money to the conservators, and what would such gifts be but benevolent contributions of income to income? It is here that I must respectfully part company from DONOVAN, J. He says that the conservators get the sum only because they have performed duties which involve them in outlay of equivalent amount. I think that the truth is that the conservators performed their duties in a manner which involved them in a considerable outlay only because they had the assurance of this income contribution from the corporation. In the next succeeding sentence DONOVAN, J., poses the question what would happen if the charitable exemption were abolished? Here, I think, the Court of Appeal has given the correct answer. A larger sum would then be "necessary" within the meaning of s. 39, and it would be arrived at by "grossing up" the £16,000 and then deducting the income tax. But this, again, is not relevant to the issue. It is merely a matter of measuring the sum "necessary".

The last point with which I must deal before coming to the authorities is the Crown's contention that, since the contribution only filled a gap between receipts and expenditure, it never could be the income of anyone. The Crown used *Moss' Empires, Ltd. v. Inland Revenue Comrs.* (1) by way of contrast, and said that there the sums paid were in fact income in the shareholders' pockets, but whose pockets does the corporation's contribution reach except the pockets of the respondents' trade creditors as payment of the debts due to them? This argument was met by the respondents' counsel with a short but cogent answer. Though the respondents paid away the whole sum of £16,006 3s. 4d. to their creditors, they were better off to the extent of £16,006 3s. 4d. by receiving it. That they paid it to creditors is in no way inconsistent with its being the respondents' income. The argument is inconsistent with the principle that one cannot determine the nature of a payment by inquiring what becomes of it, or even what must become of it, after the payee has received it.

My Lords, I am satisfied with the way in which the Special Commissioners have dealt with the question, and with their reasons. I am also in agreement with much that is said in the judgment of the Court of Appeal, though I have differed from it on the actual ground of the decision. The sum, in my opinion, is in no different position from a sum (having the requisite quality of recurrence) paid without conditions or counter stipulations out of taxed income under a covenant by a private individual to any charitable body. The Crown would neither admit nor deny that such a payment would be an annual payment to the charity within the meaning of Case III, or that the party paying it would be entitled to retain the tax, or that the charity would be entitled to recover it. We were implored to be guarded in our opinions on covenants in favour of charities. I can only say that I am compelled to follow where the argument leads. If the payment under covenant were made by an individual to a body not a charity, it could still be an annual payment, but the question whether it was in return for some consideration would probably be much more prominent and acute. If it were an annual payment the payer would be entitled to deduct tax under r. 19, but the payee would not be entitled to recover the tax.

If my analysis of the Epping Forest Act, 1878, s. 39, and my interpretation of that Act as a whole is correct, it will be apparent that the conservancy case (*Humber Conservancy Board v. Bater* (2)), in which a lump sum paid to a conservancy board by a railway company which participated in the benefits of the board's operations was held to be of the nature of a trade receipt, has

(1) [1937] 3 All E.R. 381; [1937] A.C. 785.

(2) [1914] 3 K.B. 449.



little to do with the matter. Nor, in my opinion, are the decisions in the so-called subsidy cases relevant. The facts were far removed from the facts in this case, if I am right in my presentation of them. In *Lincolnshire Sugar Co., Ltd. v. Smart* (1) the company's trade consisted in the manufacture and sale of sugar made from beet grown in this country. The industry was new and there had been a sharp fall in the price of sugar. The effect of this would, from the national point of view, have been unfortunate, for the company might not be able to pay the farmers their contract prices for the beet, and the whole policy of growing beet for sugar and manufacturing it in this country might collapse in insolvency. To meet the difficulty a statute was passed under which "advances" were made to the company in respect of the *sugar manufactured* by them from home-grown beet during a period of one year up to a maximum fixed at three hundred thousand hundredweight of manufactured sugar and at a rate not exceeding 1s. 3d. per hundredweight. It was provided that no advance was to be made unless the Minister was satisfied that the price paid to the grower was not less than the price specified in a schedule to the Act. There were certain conditional provisions for repayment which never came into operation. The question to be decided was whether the advances were loans and, therefore, not subject to income tax, or trade receipts. There was no contention that they were annual payments, and no discussion of that question. This House took the view that the grants were not loans but were artificial supplements of the trading receipts, or, in other words, of the price which the company received for its sugar, and that the supplement partook of the nature of the price supplemented. Counsel for the appellants, however, fastened on the words employed by LORD MACMILLAN:

"It was with the very object of enabling it to meet its trading obligations that the 'advances' were made; they were intended artificially to supplement the company's trading receipts so as to enable the company to maintain its trading solvency."

He said:

"Strike out the word 'trading' and every word applies literally to the payments in this case."

This is an extreme instance of construing, not the Act of Parliament, but judicial dicta. The argument is particularly subject to this objection because the words were used with reference to a wholly different issue from the issue whether there was an annual payment. But in substance the answer to the argument of counsel for the appellants is that in the present case there is nothing corresponding to the sugar, nothing corresponding to the price of the sugar, and nothing corresponding to a supplement of the price of the sugar. I need not take up much time with *Pontypridd & Rhondda Joint Water Board v. Ostime* (2). The facts are complicated, but the essence of the matter is that the water board was selling water. It could not raise the price payable by its customers, and there was a deficit in its accounts. The urban district councils, many of whose constituents were among those supplied, granted a subsidy to the board, levying on their ratepayers. The question at issue was not whether the subsidy was an annual payment or a trade receipt. The issue was whether the lump sum payments were receipts of trade or the equivalent of a rate levied by a local authority to meet a deficit on its own undertaking. This House solved the question in the same way as it had solved the *Lincolnshire Sugar Co.* case (1).

(1) [1937] 1 All E.R. 413; [1937] A.C. 697.

(2) 110 J.P. 281; [1946] 1 All E.R. 668; [1946] A.C. 477.

It held that the payments were a supplement to the water board's trading receipts, i.e., to the payments for the supply of water, and LORD MACMILLAN's words above cited were used by LORD THANKERTON to define the purpose and character of the payments.

I find it unnecessary to deal with the cases on payments out of trust funds, one of which (*Inland Revenue Comrs. v. Miller* (1)) is referred to by the Special Commissioners. They were cited and relied on by counsel for the respondents and it is not suggested that the Crown can gain any comfort from them. They are decisions on trust law, and I think they add little to the discussion of the principles involved in this case. I would dismiss the appeal with costs.

**LORD MORTON OF HENRYTON:** My Lords, I concur, and my noble and learned friend, **LORD OAKSEY**, has asked me to say that he also concurs. We have both had an opportunity of reading the opinions of LORD NORMAND and LORD REID.

**LORD REID:** My Lords. The real question in this case is whether the payments which the City of London make to the Conservators of Epping Forest under the Epping Forest Act, 1878, are or are not annual payments within the scope of the Income Tax Act, 1918, sched. D, Case III, r. 1. The appellants contend that they are not, and the first argument adduced in support of this contention is that payments in return for services are not annual payments, and that these payments are made in return for services rendered by the conservators, because the Epping Forest Act and the whole circumstances show that the city undertook to make these payments in order to have these services performed and to obtain benefit for the citizens of London. I agree with your Lordships that this argument is unsound. The conservators are a charity and the beneficiaries are the public as a whole. The city were anxious to have Epping Forest preserved for public purposes, they were responsible for obtaining the Act which set up this charity, and they undertook heavy financial responsibilities in order to achieve this result, but I cannot see any relevant distinction between this case and a case where a private benefactor has taken a leading part in founding a charity and has undertaken to pay to the charity each year such sum as may be necessary to meet any deficit from its operations. It is not admitted that sums payable under such an obligation would come within the scope of Case III, at least where the charity carries on trading operations or operations of such a kind that if a surplus were produced in any year it would be taxable under Case VI of sched. D. I shall assume in favour of the appellants that the conservators carry on such operations.

It is, I think, clear that the sums payable by the city have all the necessary characteristics of annual payments, taking "annual" in the sense in which that word is generally used in the Income Tax Act; but it is equally clear that by no means all payments which have those characteristics fall within the scope of Case III. There is no qualification or limitation of the words "annual payments" expressed in the Rules Applicable to Case III, but a limitation must be implied so as to exclude certain kinds of annual payments. The Act must be read as a whole, and construed so as to produce, so far as possible, a coherent scheme, and it is settled that Case III does not apply to payments which are in reality trading receipts in the hands of the recipients although such payments take the form of annual payments. One reason is that income tax is a tax on income and trading receipts are not income: a trader's income from his trade can only

be determined after he has deducted his expenditure from his receipts and it cannot be supposed that sums which are not income are to be taxable under Case III. But, in my judgment, the payments in this case are not trading receipts in the hands of the conservators, even if they are carrying on a trade or something in the nature of a trade. Trading receipts are generally received in return for something done or provided by the recipient for the payer, but, as I have said, that does not appear to me to be the case here.

So, if the appellants are to succeed it must be because the payments in this case fall within some other class of annual payments which, as well as annual payments received as trading receipts in return for something done or provided or to be done or provided, must for some reason be held to be excepted from the scope of Case III. But before considering this difficult question, I think it well to consider certain annual payments, not related to any benefit to the payer, which, in my opinion, are clearly within the scope of Case III. That most relevant to the present case is an annual subscription under covenant to a charity by a donor who gets no advantage to himself in return for it. If the charity is not trading or carrying on anything in the nature of a trade, I cannot see how such a payment can be excluded from the scope of Case III. What reason can there be for excluding it? Charities are not excluded from the scope of the Income Tax Acts: certain provisions entitle them to certain particular exemptions from tax, but that is all, and it was not suggested that any of those provisions affect this matter. Then on what ground can it be said that such a subscription is not income in the hands of the charity? What else could it be? It cannot be a trading receipt, because I am dealing for the moment only with a charity which is not carrying on anything in the nature of trading operations. But such a charity spends money and may need its subscriptions to meet its current expenditure. A donor might base the amount of his annual subscription on the needs of the society or might undertake to pay such sum in each year as might be necessary to balance the accounts. Would the money which he paid not be income in the hands of the society although other subscriptions in ordinary form were income? I see no escape from the conclusion that such payments to non-trading charities come within the scope of Case III. Can it then be held that the nature of the payment is essentially different if the charity happens to carry on some trading operation?

Two cases were cited by the appellants as decisive in their favour: *Lincolnshire Sugar Co., Ltd. v. Smart* (1), and *Pontypridd & Rhondda Joint Water Board v. Ostime* (2). Neither case dealt with payments to a charity and in neither case was the issue raised whether the payments there in question came within the scope of Case III. The importance of these cases lies in the fact that in both it was held that payments made without any direct return to the payer must be taken into account for income tax purposes and treated as trading receipts.

The *Lincolnshire Sugar Co.'s* case (1) was concerned with payments by the Treasury to the company under the British Sugar (Subsidy) Act, 1925, and the British Sugar Industry (Assistance) Act, 1931. It was admitted that payments under the former Act were trade receipts, but it was contended that payments under the latter Act, which were called advances, were really loans and should not be taken into account at all for income tax purposes: the company had not needed to use these payments and had not carried them to its profit and loss account. I think that the grounds of the decision of the

(1) [1937] 1 All E.R. 413; [1937] A.C. 697.

(2) 110 J.P. 281; [1946] 1 All E.R. 668; [1946] A.C. 477.

House are to be found in the following passages from the speech of LORD MACMILLAN with which the other noble and learned Lords agreed:

"What, to my mind, is decisive, is that these payments were made to the company in order that the money might be used in its business . . . if the company had not happened to be able to pay for its raw material otherwise, it could properly have used the 'advances' for this purpose. It was with the very object of enabling it to meet its trading obligations that the 'advances' were made; they were intended artificially to supplement the company's trading receipts so as to enable the company to maintain its trading solvency."

The payments in question were made during 1931-32, and it was not until 1934 that it was certain that they would not have to be set off against later payments of subsidy. After dealing with that matter LORD MACMILLAN said:

"But I do not find it necessary to rest my judgment on wisdom after the event. I prefer to rest it on my view of the business nature of the sums in question which the company received in 1931-32. I think that they were supplementary trade receipts, bestowed upon the company by the government, and proper to be taken into computation in arriving at the balance of the company's profits and gains for the year in which they were received."

In the *Pontypridd* case (1) the rates received by the water board were not sufficient to meet its expenditure, and the board was entitled to issue precepts to its "constituent authorities", two urban district councils, for amounts necessary to meet estimated deficits. It is settled that if a surplus results in any year from a public authority having collected more rates from its rate-payers than is necessary to meet current expenses that surplus is not taxable as income, and it was argued for the board that the sums received from its constituent authorities were analogous to rates collected from ratepayers. This contention was rejected, and it was held that the sums in question must be brought into account as trading receipts. VISCOUNT SIMON said:

" . . . payments in the nature of a subsidy from public funds made to an undertaker to assist in carrying on the undertaker's trade or business are trading receipts, i.e., are to be brought into account in arriving at the balance of profits or gains under sched. D, Case I",

and he cited the *Lincolnshire Sugar Co.* case (2) as an illustration of this. LORD THANKERTON, quoting words used by LORD ATKIN in an earlier case, said (*ibid.*, 674) that these sums were received "'as a sum which went to make up the profits or gains of their trade'" and he also relied on the *Lincolnshire* case (2).

While it is true that no one contended in these cases that the payments there in question were annual payments within the scope of Case III, and no reference was made to Case III, it might now be difficult to argue, in face of clear statements that those payments were trade receipts, that similar payments can now be treated as annual payments. But it is another matter to treat these cases as laying down a general rule that no payment can come within the scope of Case III if words used in this House in these cases can be applied to it. These cases dealt with payments in the nature of a subsidy. LORD MACMILLAN rested his opinion in the *Lincolnshire* case (2) on "the

(1) 110 J.P. 281; [1946] 1 All E.R. 668; [1946] A.C. 477.

(2) [1937] 1 All E.R. 413; [1937] A.C. 697.



business nature of the sums in question" and VISCOUNT SIMON in the *Pontypridd* case (1) referred to payments "to assist in carrying on the undertaker's trade or business". In my opinion, the payments in the present case were not of a business nature—they were of a benevolent nature—and they were not primarily made to assist in carrying on any trade or business—they were made primarily to achieve a public benefit of a charitable nature. If the appellants are right, the result would be far-reaching and, in my opinion, anomalous. Many, if not all, subscriptions to a charity which achieves its charitable object by trading could properly be described as intended to supplement its trading receipts, or to assist it in carrying on its trade, but if that were the sole criterion, the result would be an unreal distinction between charities which do not trade and those which do: in the one case subscriptions would be part of their income and within Case III, and in the other case not. If one reason, and, perhaps, the main reason, for excluding from Case III payments which apparently fall within its scope is to produce a coherent scheme of taxation, I cannot see anything coherent or reasonable in so distinguishing between charities which do trade and charities which do not, but, on the other hand, to treat all business payments alike, whether or not the payer gets any direct return for them, seems to me to be eminently reasonable. I would reserve my opinion about a payment which is primarily benevolent but which brings some incidental benefit to the donor.

The appellants also submitted a rather different argument. This was, as I understand it, that a payment which is destined to go into the profit and loss account of the recipient cannot be within the scope of Case III. Case III only deals with payments which are profit income in the hands of the recipient and if a receipt has to go into a profit and loss account and be set against outgoings it cannot be all profit. The appellants point out that no part of the sums paid by the city in this case can ever be profit in the hands of the conservators, because the amount of any sum payable is measured by the amount of the conservators' deficit, and, therefore, the whole of it must go to pay expenses and no part of it can ever be profit. This argument appears to me to be based on some misunderstanding of what the Act means by income or profit. Such cases as *Forth Conservancy Board v. Inland Revenue Comrs.* (2) and *Mersey Docks & Harbour Board v. Lucas* (3) make it clear that a receipt or surplus is none the less income although the recipient is bound to use it in a particular way and cannot enjoy it as a profit in the ordinary sense. Reference was made to a judgment of LORD GREENE in *Re Hanbury* (4). There LORD GREENE contrasted annual payments "which the Acts regard and treat as being pure income profit of the recipient" with those

"the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient, the proper way of treating them being to treat them as an element to be taken into account in discovering what the profits of the recipient are."

The phrase "pure income profit" is appropriate in the sense that the rules applicable to Case III permit no deductions, and I think that the context shows that LORD GREENE was referring to this. I cannot think that he meant that Case III only applies to payments which are pure profit in the sense that the recipient is free to use them as he pleases. He does not say that because a

(1) 110 J.P. 281; [1946] 1 All E.R. 668; [1946] A.C. 447.

(2) 95 J.P. 160; [1931] A.C. 540.

(3) (1883), 48 J.P. 212; 8 App. Cas. 891.

(4) (1939), 20 A.T.C. 333.

payment has to go into a profit and loss account, therefore, it is not pure profit income. He puts it the other way round, and says in effect that if you find payments

"the very quality and nature of which make it impossible to treat them as part of the pure profit income of the recipient"

then you treat them as an element in the profit and loss account. So one must first inquire into the quality and nature of the payment, and not as to its destination. Not every receipt by a trader in the course of his business is a trading receipt in the income tax sense. For instance, "interest of money" is specially mentioned in Case III as falling within the scope of that Case. It may be a business receipt which would appear in the trader's profit and loss account made up for ordinary business purposes, but, having been already taxed at source, it must be excluded from his profit and loss account for the purpose of Case I, or otherwise it would be taxed twice. So, in my opinion, neither the fact that the amount of the payments in this case is measured by the amount of the conservators' deficit, nor the fact that the conservators cannot use these payments as they please, but must carry them to the profit and loss account to extinguish that deficit, can determine whether or not these payments come to them as income. For the reasons which I have given, I am of opinion that these payments are income in the hands of the conservators and fall within the scope of Case III. I, therefore, agree that this appeal should be dismissed.

**LORD COHEN:** My Lords, I also concur.

*Appeal dismissed.*

Solicitors: *Solicitor of Inland Revenue; Comptroller and City Solicitor.*

G.F.L.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PARKER, JJ.)

Apr. 21, 1953

REG. v. FULHAM, HAMMERSMITH AND KENSINGTON RENT TRIBUNAL.

*Ex parte* HIEROWSKI

*Rent Control—Rent tribunal—Re-consideration of registered rent—Change of circumstances—Jurisdiction of tribunal—Receipt by landlord of war damage compensation—Furnished Houses (Rent Control) Act, 1946 (9 and 10 Geo. 6, c. 34), s. 2 (3).*

On June 21, 1949, the tenant of a furnished flat referred the tenancy to a rent tribunal which fixed the rent at £6 6s. per week, and that rent was entered in the local authority's register. Under an agreement dated May 24, 1952, a new tenant entered into possession at a rent of £6 10s. per week, the 4s. increase in rent representing an increase in rates and other outgoings. In October, 1952, the landlord claimed the right to re-enter on account of alleged breaches of covenant, and the tenant referred the tenancy to the tribunal, but alleged no change of circumstances under s. 2 (3) of the Furnished Houses (Rent Control) Act, 1946. The landlord, in his answer, stated that the rent and other outgoings had increased, but that he had refunded to the tenant the 4s. a week on having been informed by the clerk to the tribunal that it was an overcharge. On Dec. 12, 1952, the tribunal dealt with the matter and ordered a reduction of the rent to £4 14s. 6d. per week, treating the increase in the rates and outgoings as a change of circumstances entitling them to deal with the whole matter at large. They also took into consideration the fact that the landlord had received war damage compensation in respect of the premises. The landlord applied for an order of

certiorari to quash the decision of the tribunal as having been made without jurisdiction.

**HELD:** that under s. 2 (3) of the Act the tribunal had jurisdiction to consider the reference only if there had been a change of circumstances; no change of circumstances had been alleged, and the receipt of the war damage compensation by the landlord was entirely irrelevant; and, therefore, the order for certiorari must issue.

**Per LORD GODDARD, C.J.:** All that the tribunal could consider was the change of circumstances alleged—namely, the increase in rates, which gave the tribunal no jurisdiction to re-open the question of the rent.

**Per LYNSEY and PARKER, J.J.:** The change of circumstances which the tribunal could consider was not limited to that alleged by the person applying. They were entitled to consider any change of circumstances, but not the whole case de novo.

#### APPLICATION for order of certiorari.

A furnished flat at 100 Masbro Road, Kensington, was let by the applicant, Bigniew Hierowski, the present landlord, at a weekly rent of £7. On June 21, 1949, the tenant referred the tenancy to the Fulham, Hammersmith and Kensington Rent Tribunal, which reduced the rent to £6 6s. a week, and that rent was entered in the local authority's register. By an agreement dated May 24, 1952, the landlord let the premises to a new tenant at £6 10s. a week, the 4s. increase representing an increase in rates and other outgoings. In October, 1952, the landlord claimed the right to re-enter on account of alleged breaches of covenant, and the tenant referred the tenancy to the tribunal, but alleged no change of circumstances. The landlord, in his answer to the reference, set out the facts that the rent and other outgoings had increased, but said he had refunded the 4s. a week increase to the tenant. On Dec. 12, 1952, the tribunal reduced the rent to £4 14s. 6d. a week. They treated the 4s. a week increase as a matter entitling them to deal with the whole matter at large de novo, and also took into consideration the fact that the landlord had received compensation for war damage in respect of the premises. The landlord obtained leave to apply for an order of certiorari to quash the decision of the tribunal. The grounds on which certiorari was sought were (i) that the tribunal had no jurisdiction under the Furnished Houses (Rent Control) Act, 1946, to make their decision, and (ii) that the tribunal, having, on June 21, 1949, reduced the rent from £7 per week to £6 6s. per week, which rent was entered in the register kept by the local authority in pursuance of the Act of 1946, had no jurisdiction to reduce the rent further except on the grounds of change of circumstances which was at no time alleged and of which there was no evidence.

*Ackner* for the landlord.

*J. P. Ashworth* for the tribunal.

**LORD GODDARD, C.J.:** Counsel for the landlord moves for an order of certiorari directed to the Fulham, Hammersmith and Kensington Rent Tribunal to bring up and quash a decision by which they reduced the registered rent of certain premises from six guineas a week to £4 14s. 6d. a week.

In June, 1949, these premises had been let furnished by the landlord to a tenant at a weekly rent of £7. The tenant referred the contract to the tribunal under the Furnished Houses (Rent Control) Act, 1946, and the tribunal reduced the rent to six guineas a week. That rent was entered in the register of the local authority under s. 3 (2) of the Act. Thereafter, the rates and other outgoings were increased, and the landlord sought to recoup himself by making a charge for the increased amounts which he had to pay. What he ought to have done was to have gone back to the tribunal and asked for a re-consideration on the ground of a change in circumstances, namely, the increased rates.

Meanwhile, a new tenant, who had come into the premises referred the tenancy to the tribunal, but he alleged no change of circumstances under s. 2 (3) of the Act of 1946. It is clear, therefore, that, in the absence of a change of circumstances, and, I would add, a change of circumstances on which the tenant could rely, the case was entirely covered by *Rex v. Fulham, Hammersmith & Kensington Rent Tribunal. Ex p. Gormly* (1), in which this court granted certiorari and quashed the decision of the tribunal where they had interfered with a rent which they had fixed. The court pointed out that, once the rent had been fixed, it could only be altered under the provisions of s. 2 (3) on the ground of change of circumstances.

When the landlord had to put in an answer to the tenant's reference, he set out the facts that the rates had gone up and that he had increased the rent by 4s. a week, but, meanwhile, he had refunded that 4s. a week to the tenant. Thereupon, the tribunal seem to have seized on that as a change of circumstances and proceeded on the tenant's application to reduce the rent from six guineas a week to £4 14s. 6d. a week. When one puts it in that way, one sees at once that it is impossible to construe the Act of Parliament in the way in which the tribunal did.

Section 2 (3) of the Act provides:

"Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances, and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable."

That would give the tribunal power to increase the rent if the landlord applied on the ground of a change of circumstances. The only words we need consider are:

"it shall be lawful for the lessor or the lessee or the local authority to refer the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances . . ."

The tribunal have, apparently, taken the view, and counsel for the tribunal has strenuously argued on their behalf, that, once any change of circumstances is shown, the matter is at large for the tribunal to deal with as they like. Speaking for myself, if that were the construction which should be placed on this sub-section, it would be nothing more nor less than a trap, because a landlord who went to the tribunal and said:

"I ask you to re-consider this on the ground that there has been a rise in the rates",

might suddenly be met with the whole case being re-opened and the tribunal saying:

"We are not going to increase the rent on the ground that the rates have gone up. Although the rates have gone up, we are going to put the rent down."

That seems to me to be a most astonishing proposition. The true construction, in my opinion, which should be placed on this sub-section is that all that the tribunal can consider is the change of circumstances alleged. They are to

(1) 116 J.P. 22; [1951] 2 All E.R. 1030; [1952] 1 K.B. 179.



re-consider the rent on the ground of change of circumstances. The only change of circumstances existing here is the rise in the rates, which was not set up by the tenant, but was set up by the landlord. In considering the tenant's application, therefore, it followed that the only change of circumstances that had arisen since the rent had previously been fixed was the rise in rates, and, accordingly, the tribunal were limited to founding their jurisdiction on that matter. In my opinion, they had no power and no jurisdiction to regard this as a case in which the whole matter was at large so that they could inquire into whether they had fixed a proper rent on the previous occasion.

But there is another ground on which, in my opinion, the court is bound to grant certiorari. If it can be shown that an inferior tribunal has come to its decision by taking into account matters which it ought never to have taken into account and are virtually extraneous to what they have to decide, that is a ground for granting certiorari. The chairman, in his affidavit, has frankly stated that the tribunal acted as they did on grounds which appear to this court to be entirely irrelevant, quite apart from the fact that nobody asked them to act on those grounds and quite apart from the fact that this was not the complaint of the tenant. The ground the chairman has set out is this:

"Upon a comparison of the answers given to question (8) in the lessor's particulars (Form F.R.4A) on the present occasion and on the previous consideration by the tribunal it appeared to the tribunal that the matter of war damage compensation was a new factor. I had presided as chairman at the hearing by the tribunal of the application by the [previous tenant] and to the best of my recollection the matter of war damage had not been brought to the notice of the tribunal on that occasion. In the presence of the said Hierowski and the [present tenant] I there and then telephoned the surveyor's department of Hammersmith Metropolitan Borough Council and was informed by them that the damage claim approximated to £815 and the said Hierowski agreed that he had received this sum. This appeared to the rent tribunal materially to affect their decision as to what should be the appropriate rent of the premises under the said Act of 1946. While the tribunal have never considered it to be conclusive they nevertheless normally have had regard to the capital expenditure by a landlord on the provision of the accommodation under reference."

The circumstances were these. The landlord bought the premises in a war-damaged condition. He received a sum of money and spent it on the premises for the purpose of repairing the damage. How the tribunal could come to the conclusion that it made any difference whatever where the money came from, whether the landlord took it out of his own pocket, or a friend lent it to him, or he recovered it from the War Damage Commission, I do not know, but that was a point which ought never to have been taken into consideration. It was entirely irrelevant to the matters which the tribunal had to consider, and as, on the face of the chairman's affidavit, it appears that that was one of the factors which operated on the tribunal in coming to the conclusion they did, it seems to me, on that ground also, that certiorari must go.

**LYNSKEY, J.:** I agree. Section 2 (3) reads:

"Where the rent payable for any premises has been entered in the register in accordance with the provisions hereinafter contained, it shall be lawful for the lessor or the lessee or the local authority to refer

the case to the tribunal for re-consideration of the rent so entered on the ground of change of circumstances . . ."

It seems to me that the natural meaning of those words is that the tribunal are given power to re-consider the rent on the ground of the change of circumstances, or, in other words, to re-consider the rent in the light of such change of circumstances, but it is suggested by the tribunal that the remaining words of the sub-section:

" . . . and the provisions of sub-s. (2) of this section shall apply on any such reference in like manner as they apply on a reference under sub-s. (1) of this section subject to the modification that the tribunal shall have power to increase the rent payable",

in some way either qualify or extend the jurisdiction given to them by the first portion of the sub-section to re-consider the rent on the ground of change of circumstances. I do not so read that portion of the sub-section. It provides the machinery whereby the tribunal shall re-consider the rent on the ground of change of circumstances. The tribunal can only re-consider the rent if there is a change of circumstances, and they must adjust the rent in the light of that change of circumstances. But, speaking for myself, I would not limit their power to consider the change of circumstances to that change of circumstances which is alleged by the person applying for re-consideration, whether lessor, lessee or local authority. The tribunal are entitled, once they have jurisdiction to deal with the reference, to consider any change of circumstances, but their decision must be the result of considering a change of circumstances and not a re-decision on circumstances which existed when they first fixed the rent. In the present case it seems to me that the tribunal have gone far beyond their powers. There was no change of circumstances alleged, and, so far as I can see on the application before them, no person asked them to exercise their powers under s. 2 (3). I agree with my Lord that there should be certiorari.

**PARKER, J.:** I agree with both judgments delivered, and I would only add a word with regard to the construction of s. 2 (3). Counsel for the tribunal has contended that under that sub-section the tribunal have jurisdiction to consider the reference if there has been any change of circumstances, whether it is one which redounds to the benefit of the landlord or to the benefit of the tenant. He then goes on to argue that the tribunal, once they have jurisdiction, are entitled to consider, not only the change of circumstances, but the whole case *de novo*, thereby incidentally getting the right to review a decision which they feel is wrong. With regard to the first contention, I entirely accept that. It seems to me, that, in order that the tribunal should have jurisdiction—it matters not what the change of circumstances may be, whether, on a tenant's application, it be an increase in rates which are payable by the tenant, or, on a landlord's application, some other change which would be to the benefit of the tenant—once there is a change, there is jurisdiction. But as regards counsel for the tribunal's second contention, it seems to me contrary to the natural reading of the sub-section. In effect, he is forced to read the sub-section as if the words "on the ground of change of circumstances" qualify the referring of the case—in other words, that they mean only in the event of a change of circumstances. On the natural reading of the words the re-consideration which the tribunal are to make is one having regard to the change of circumstances, and to that alone. It is suggested that the reference thereafter to the provisions of sub-s. (2) of the section shows that the tribunal are really re-considering the whole case *de novo*. I certainly do not read it in that way;

sub-s. (2) is only invoked as part of the machinery for determining the adjustment which is to be made having regard to the change of circumstances which has been proved. For these reasons, I agree that this order should go.

*Order for certiorari.*

Solicitors: *S. Farren & Co.* (for the landlord); *Solicitor, Ministry of Health* (for the tribunal).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSKEY AND PARKER, J.J.)

Apr. 20, 24, 1953

BICKNELL v. BROSNAN

*National Service—Person “ordinarily resident in Great Britain”—Residence for over two years—Citizen of Republic of Ireland—Domicil in, and intention to return to, Ireland—National Service Act, 1948 (11 & 12 Geo. 6, c. 64), s. 34 (4) (b), (c)—British Nationality Act, 1948 (11 & 12 Geo. 6, c. 56), s. 3 (2)—Ireland Act, 1949 (12 & 13 Geo. 6, c. 41), s. 3 (1) (a), s. 3 (2) (a).*

By s. 3 (2) of the British Nationality Act, 1948, citizens of Eire are to be treated as British subjects for the purpose of any Act which was in force at the date of the commencement of that Act. This includes the National Service Act, 1948, which was passed before the British Nationality Act and came into force on the same day. By s. 3 (1) (a) of the Ireland Act, 1949, the operation of the British Nationality Act, 1948, and, in particular, s. 3 thereof, is not to be affected by the fact that the Republic of Ireland is not part of Her Majesty's Dominions, and by s. 3 (1) (b) of the Act of 1949 references in the Act of 1948 to citizens of Eire are to include references to citizens of the Republic of Ireland.

The effect of s. 1 (1) and s. 34 (4) of the National Service Act, 1948, read together with s. 3 (1) and s. 3 (2) (a) of the Ireland Act, 1949, is that a citizen of the Republic of Ireland who is of the appropriate age and has been resident in Great Britain for more than two years and does not come within any of the excepted classes is liable to national service under the Act of 1948.

The respondent, who was a citizen of the Republic of Ireland came to England in 1949, when he was eighteen years old. He obtained employment as a builder's labourer and resided in England ever since, but intended eventually to return to Ireland and settle there. He refused to comply with a notice under s. 8 (1) of the National Service Act, 1948, served on him in September, 1952, requiring him to submit himself to medical examination.

HELD: that the respondent was not residing in Great Britain for a temporary purpose only within the meaning of s. 34 (4) (b) of the Act, that he was liable for national service thereunder, and, on failing to comply with the notice, had committed an offence under s. 8 (4) of the Act.

CASE STATED by Bristol justices.

At a court of summary jurisdiction sitting at Bristol on Dec. 9, 1952, an information was preferred by the appellant, Oscar Dunford Bicknell, an officer of the Ministry of Labour and National Service, charging the respondent, Patrick Brosnan, with an offence against the National Service Act, 1948, s. 8 (4), in that, being a person subject to registration under the Act, he failed to comply with the requirement of a written notice in the prescribed form duly served on him requiring him to submit himself to a medical examination by a medical board on Oct. 10, 1952.

The respondent was born on Feb. 25, 1931, at Tralee, co. Kerry, in the territory of what was then the Irish Free State and is now the Republic of

Ireland. He claimed to be and was a citizen of the Republic of Ireland. He lived in Ireland until May, 1949, when he came to England where he obtained employment as a builder's labourer. Apart from one month's holiday in Ireland, he had resided in England continuously since May, 1949. He intended eventually to return to Ireland and to make his permanent home there, but it was impossible to determine when he would do so, and at present his usual place of residence was Bristol. On Sept. 26, 1952, notice was served on him, under the National Service Act, 1948, s. 8 (1), requiring him to submit himself to medical examination by a medical board on Oct. 10, 1952. He refused to do so on the ground that he was an Irish citizen. The appellant contended (i) that the respondent was a person subject to registration within the meaning of the National Service Act, 1948, s. 6 (2) and s. 8 (1), and (ii) that, even if the respondent were not a British subject, the provisions of the National Service Act, 1948, applied to him as if he were a British subject by virtue of the British Nationality Act, 1948, s. 3 (2), and the Ireland Act, 1949, s. 3 (1). The respondent contended, *inter alia*, (i) that he was resident in Great Britain for a temporary purpose only, (ii) that he was not a British subject, and (iii) that the sole purpose of the British Nationality Act, 1948, s. 3 (2), and of the Ireland Act, 1949, s. 3 (1), was to prevent Irishmen from suffering the disabilities of aliens. The justices, being of the opinion that the respondent was not a British subject, dismissed the information. The appellant appealed.

*The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and S. B. R. Cooke for the appellant.*

*G. A. Forrest for the respondent.*

*Cur. adv. vult.*

Apr. 24. **LORD GODDARD, C.J.**, read the judgment of the court, in which, after stating the facts, he said: The material sections which we have to consider are, first, s. 1 (1) and s. 34 (4) of the National Service Act, 1948. Section 1 (1) provides that every male British subject ordinarily resident in Great Britain between the ages of eighteen and twenty-six, subject to certain excepted classes which are immaterial for the purposes of this case, shall be liable to be called on to serve in the armed forces of the Crown, and the Act contains consequential provisions for the registration of people liable for service and for their medical examination: see s. 7 and s. 8. Section 34 (4) provides:

"For the purposes of this Part of this Act, a person who is resident in Great Britain shall be deemed to be ordinarily resident there unless—  
(a) he is residing there only for the purposes of attending a course of education; or (b) the circumstances of his residence in Great Britain are otherwise such as to show that he is residing there for a temporary purpose only; or (c) being a person who is, under the provisions of any Act in force in any part of [Her] Majesty's dominions outside Great Britain, a national or citizen of that part within the meaning of that Act, or a person who was born or is domiciled in any such part of [Her] Majesty's dominions or in a British protectorate, a mandated territory, a trust territory or any other country or territory being a country or territory under [Her] Majesty's protection or suzerainty, he has been resident in Great Britain for less than two years."

We shall refer at the end of this judgment to the exception contained in s. 34 (4) (c). As the justices held that the respondent was not a British subject, they did not find it necessary to deal with the question whether his residence was only temporary and we shall dispose of this point at once. On the evidence



it is impossible to hold that he is a mere temporary resident. Clearly, a temporary resident for this purpose means a person who is paying a visit, whether for social or business purposes, and merely making a short stay. This is emphasised by the fact that a person resident for the purposes of attending a course of education, which might easily last three or four years, is specially exempted by s. 34 (4) (a) of the Act. The respondent is here for an indefinite period and the fact that he intends to return at some unspecified date, so that he retains his Irish domicile, does not make him a temporary resident so as to bring him within s. 34 (4) (b) of the Act.

We have, therefore, to consider whether for the purposes of the National Service Act, 1948, the respondent is to be regarded as a British subject or, at any rate, as liable to be called on for service, and the material sections that we have now to consider are contained in the British Nationality Act, 1948. That Act and the National Service Act were both passed on July 30, 1948, and both came into force on Jan. 1, 1949. It is material to observe that up to that time Irish citizens ordinarily resident in this country were liable to the provisions of the Acts then relating to national service. By s. 1 (1) of the British Nationality Act:

"Every person who under this Act is a citizen of the United Kingdom and colonies or who under any enactment for the time being in force in any country mentioned in sub-s. (3) of this section [which are the countries commonly referred to as the dominions] is a citizen of that country shall by virtue of that citizenship have the status of a British subject."

Eire is not mentioned in that section. By s. 2 (1) citizens of Eire who were immediately before the commencement of the Act British subjects were given an option to remain British subjects provided that they satisfied certain conditions. Then s. 3 (2) provides:

"Subject to the provisions of this section, any law in force in any part of the United Kingdom and colonies or in any protectorate or United Kingdom trust territory at the date of the commencement of this Act, whether by virtue of a rule of law or of an Act of Parliament or any other enactment or instrument whatsoever, and any law which by virtue of any Act of Parliament passed before that date comes into force in any such place as aforesaid on or after that date, shall, until provision to the contrary is made by the authority having power to alter that law, continue to have effect in relation to citizens of Eire who are not British subjects in like manner as it has effect in relation to British subjects."

The only construction that the court can put on this sub-section is that the whole of the English law, whether common law or statute, in force at the date of the commencement of the Act is applied to citizens of Eire in like manner as it is to British subjects, and that the statute law applied to them includes any law passed before the commencement of the Act but which comes into force on or after that date which, as we have already said, is Jan. 1, 1949. As by the terms of that sub-section the law, whether common law or statute, in force at that date is to continue to have effect with relation to citizens of Eire who were not British subjects in like manner as it has effect in relation to British subjects, it seems to us that that must mean that citizens of Eire are to be treated for the purpose of such Acts in exactly the same way as though they were British subjects. It may at first sight seem that s. 3 (2) of the British Nationality Act is a somewhat obscure method of applying the National Service Act to citizens of Eire ordinarily resident in this country,

but, as the Solicitor-General pointed out, as the two Acts were passing through Parliament together it would have been difficult and contrary to Parliamentary practice to apply expressly the provisions of the British Nationality Act while it was still only a Bill to the National Service Act which was also only a Bill, and not law, at the time when the former Act was passing through Parliament. But whatever the reason, it appears to us that, applying to s. 3 (2) of the British Nationality Act the ordinary canons of construction, which require a court to give the plain grammatical meaning to the words used, it is impossible to hold that the provisions of an Act, which had been passed before the British Nationality Act and which came into force on the same day as that Act, are not effective so as to make a citizen of Eire who is ordinarily resident here, and is not within the excepted classes mentioned in sched. I to the National Service Act, subject to its provisions.

It is unnecessary for the purposes of this judgment to deal with s. 3 (1) of the British Nationality Act, as it would not appear to have any application to the facts of this case, but we would add that, as the National Service Act, 1948, is a consolidating Act, if it was intended to exempt persons hitherto liable for service, as the citizens of Eire were at the time of its passing, one would expect to find that they were exempted by clear words. The Ireland Act, 1949, s. 1 (3), provides that that part of Ireland theretofore known as Eire is to be referred to thereafter as the Republic of Ireland. It is, however, specially provided by s. 3 (1) (a) of that Act that the operation of the provisions of the British Nationality Act, 1948, and, in particular, s. 2, s. 3 and s. 6 thereof, is not affected by the fact that the Republic of Ireland is not part of Her Majesty's dominions, and, by s. 3 (1) (b), reference in the said provisions to citizens of Eire include, on their true construction, references to citizens of the Republic of Ireland. It is enough to say that the effect of s. 3 (1) and s. 3 (2) (a) of that Act, coupled with s. 34 (4) (c) of the National Service Act, seems to be that, if a citizen of the Republic of Ireland has been resident in Great Britain for less than two years, he is not to be regarded as ordinarily resident here, but, as the respondent has been resident here since 1949, it follows that he is to be regarded as ordinarily resident here. The effect of the various statutory provisions to which we have referred is that a national or citizen of the Republic of Ireland who is ordinarily resident in Great Britain, and is of the appropriate age and not in one of the excepted classes, is subject to the National Service Act, and, accordingly, we allow this appeal with costs and send the case back to the justices with a direction to convict.

*Appeal allowed.*

Solicitors: *Solicitor, Ministry of Labour and National Service* (for the appellant); *Pengelly & Co.*, agents for *J. W. Ward & Son*, Bristol (for the respondent).

T.R.F.B.

## QUEEN'S BENCH DIVISION

(GORMAN, J.)

Apr. 14, 15, 16, 1953

LONDON COUNTY COUNCIL v. HAYS WHARF CARTAGE CO., LTD.

*Street Traffic—Licence—Rate of duty—Haulage vehicle—Unladen weight—Ballast block—“Loose equipment”—Tractor carrying tools and ballast—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 26—Finance Act, 1933 (24 and 25 Geo. 5, c. 19), s. 25, sched. VII, Part II, para. 4 (e) (ii).*

A cast iron block, some fifty hundredweights in weight, was fitted to a heavy duty tractor by its owners. It was held in position by angle-irons and was used as ballast. Other pieces of metal, heavy chain, and similar articles were also carried on the vehicle.

**HELD:** (i) the carriage of tools or ballast, or any other object to assist its propulsion or render it fit for the purposes of haulage, did not detract from the essential character of the tractor as a haulage vehicle, and the tractor, being used for “haulage solely”, fell within the Finance Act, 1933, sched. VII, Part II, para. 4 (e), and the rate of excise duty was at the rate laid down in para. 4 (e) (ii).

(ii) the iron block, when fixed to the vehicle, was not “loose equipment” within the Road Traffic Act, 1930, s. 26, but formed part of the vehicle, and, therefore, must be included in its weight unladen, thereby increasing the rate of excise duty payable on it from that paid by the defendants.

*Darling v. Burton* (1928 S.C. (J.) 11) and *Lowe v. Stone* (1948) (113 J.P. 59), considered.

**ACTION.**

The defendants, Hays Wharf Cartage Co., Ltd., were the owners of a Scammell heavy duty tractor, which they used for towage purposes. A strong wooden box frame covered with tarpaulin was fitted on the platform behind the driver's cabin and over the rear axle. On July 18, 1946, the plaintiffs, the London County Council, inspected the vehicle on the ground that the defendants had failed to pay the proper rate of excise duty on it. On that day there was fixed to the vehicle, in the box behind the cab, a cast iron block, some fifty hundredweights in weight, fastened by angle-irons, and there were also on the vehicle some pieces of heavy plate steel, some short lengths of heavy chain, “D” shackles, and ship jacks. The plaintiffs contended that the block was attached to the vehicle as fixed ballast, and that the other articles were also used as ballast. They further contended that the vehicle was either a “haulage” vehicle under the Finance Act, 1933, sched. VII, Part II, para. 4 (e) (ii), or that it was a “goods” vehicle under the Finance Act, 1933, sched. VII, Part III, para. 5 (c) and (d), as amended by the Finance Act, 1935, s. 3 (2), and the Finance (No. 2) Act, 1945, s. 4 (3), and sched. II, Part II. They claimed that, into whichever category the vehicle fell, the defendants had not paid the appropriate rate of excise duty. The defendants, in their defence, admitted that the vehicle was a haulage vehicle, but denied that they had ever used fixed ballast, though they had used ballast on occasions. They contended that the ballast ought not to be taken into account in determining the weight unladen of the vehicle under the Road Traffic Act, 1930, s. 26, and claimed that they had paid duty appropriate to the vehicle, and that, therefore, no balance was owing to the plaintiffs.

*Lloyd-Jones, Q.C.*, and *R. J. S. Harvey* for the plaintiffs.

*Karmel, Q.C.*, and *S. B. R. Cooke* for the defendants.

**GORMAN, J.**, stated the facts and considered the evidence, and found as a fact that on July 18, 1946, there was in use on the vehicle a fixed ballast

block, weighing some fifty hundredweights, and that other articles were primarily on the vehicle for use as loose tools or equipment and not as ballast, and continued: The first matter that I am concerned with is whether this vehicle was a haulage vehicle or not. The Finance Act, 1933, sched. VII, Part II, para. 4 (e), contains this definition of haulage vehicles:

"Vehicles . . . which are constructed and used upon roads for haulage solely . . ."

In Part III, para. 5, of the same schedule there is a definition of "goods vehicles". Counsel for the plaintiffs asks me to say that the two definitions are not necessarily exclusive, but at any rate, so far as a haulage vehicle is concerned, the governing words of that definition are "constructed and used upon roads for haulage solely". Paragraph 4 (e) continues:

" . . . and not for the purpose of carrying or having superimposed upon them any load except such as is necessary for their propulsion or equipment."

Endeavouring properly to interpret that, the governing words are "haulage solely", but it is conceded that even though a vehicle is "constructed and used for haulage solely" it may be necessary to "carry or superimpose" something on it. But that which is carried or superimposed on it must not take away the essential nature and function of that vehicle, i.e., construction and use for "haulage solely". It seems to me that it is not straining the words of that definition to put it in this way: " . . . and not for the purpose of carrying or having superimposed upon them any load except such as is necessary for their propulsion or their equipment". There is a difference between what one might call a common noun and an abstract noun. "Equipment" might refer to particular items, and, on the other hand, it might refer to a state of being equipped. It seems to me that what is postulated in that definition is that the vehicle must be used for "haulage solely", but that if anything is put on it which is necessary either for its propulsion or properly to render it fit for purposes of haulage that shall not prevent its being a haulage vehicle. You might, for instance, have tools, or such things as blocks or ballast being added, in order to render it in a fit state of equipment for its work as a haulage vehicle. I have also considered the definition of "goods vehicle" in the Finance Act, 1933, sched. VII, Part III, para. 5. There are two expressions which add greatly to the width of it. One is, "for the conveyance of goods or burden of any description", and the other is "whether in the course of trade or otherwise". Having heard counsel for both sides, my view is that this vehicle comes within the definition of a haulage vehicle, i.e., within the description of vehicles in para. 4 (e) of Part II of sched. VII to the Act of 1933. There might be, as counsel for the plaintiffs says, some overlapping of these two definitions, but, in my judgment, this is in fact a haulage vehicle.

The next matter I have to consider is the application to this vehicle of the Road Traffic Act, 1930, s. 26. It is submitted by counsel for the defendants that the ballast (using the word in its widest possible form) must be excluded from the weight unladen of a vehicle. He divided the section up into the positive and the negative parts, the positive part going down to the word "but" and the negative part following thereafter, and he contended that the section is inapt to include anything by way of ballast. He said that, to start with, ballast is not "parts" but it is "equipment". On the other hand, counsel for the plaintiffs says that the section is apt, having regard to the whole of its terms, to include ballast. I have been referred, so far as this section is concerned,



to two authorities. The first was *Darling v. Burton* (1), which was an action brought under the Roads Act, 1920, s. 7 (6), which provided, in the same words as now appear in s. 26 of the Act of 1930, that:

" . . . the weight unladen of any vehicle shall be taken to be the weight of the vehicle inclusive of the body and all parts . . . which are necessary to or ordinarily used with the vehicle when working on a road, but exclusive of the weight of . . . loose equipment . . ."

It was held:

" that movable shelving, fitted to slide on brackets in a baker's van, and used to facilitate the delivery of goods to customers, was loose equipment within the meaning of the section, and did not fall to be included in the weight unladen of the vehicle."

In his judgment, the Lord Justice-General (LORD CLYDE) said that the respondent

" had brackets affixed to the inside of the body—which thus became undoubtedly parts of the body, and consequently added to 'the weight unladen' of the vehicle. By means of these brackets he was able to slide or run into the inside of the body trays, shelves, or boards containing his products, and made of a size to fit the inside of the body."

Then the question was whether they had to be included in the weight of the vehicle:

" It will be observed that they play no part except as a facility for loading the van, and perform no function except as holders, or containers of the goods transported. Boxes, baskets, trays of one kind or another, and cans are familiarly used in tradesmen's delivery vans; but it would hardly occur to anyone to regard them as parts of the unladen vehicle . . . What then are they, in the phraseology of the section? I see no difficulty in regarding them as included under the statutory term 'loose equipment', and loose equipment is not to be included in the unladen weight."

LORD BLACKBURN said that he agreed. I think it is important in considering that case to bear in mind what LORD CLYDE said:

" . . . that they play no part except as a facility for loading the van, and perform no function except as holders, or containers of the goods transported."

In *Lowe v. Stone* (2) the headnote is:

" By the Finance Act, 1922, s. 14 (1): 'Where a licence has been taken out for a mechanically-propelled vehicle at any rate under the Finance Act, 1920, sched. II, and the vehicle is at any time while such licence is in force used in an altered condition or in a manner or for a purpose which brings it within, or which if it was used solely in that condition or in that manner or for that purpose would bring it within, a class or description of vehicle to which a higher rate of duty is applicable under the said schedule, duty at such higher rate shall become chargeable in respect of the licence for the vehicle'. Section 14 (2) imposes a penalty if the vehicle is used in an altered condition without the appropriate higher rated licence being taken out. By s. 26 of the Road Traffic Act, 1930: 'For the purposes of this Part of this Act, and of any other enactment relating to the use

(1) 1928 S.C. (J.) 11.

(2) 113 J.P. 59; [1948] 2 All E.R. 1076.

of motor vehicles on roads, the weight unladen of any vehicle shall be taken to be the weight of the vehicle inclusive of the body and all parts . . . which are necessary to or ordinarily used with the vehicle when working on a road, but exclusive of . . . loose tools and loose equipment.'

The respondent was convicted of unlawfully using a 3-ton lorry, while a particular licence was in force, in an altered condition which brought it within a class or description of vehicles to which a higher rate of duty was applicable, without taking out a licence at the appropriate higher rate, contrary to s. 14 of the Act of 1922. On the day in question the lorry, the unladen weight of which, in its ordinary use, would not exceed three tons, was being used with boards fitted to its sides by means of slots for the purpose of carrying a load of slack, and with those boards the unladen weight was over three tons.

*Held:* that the boards fitted to the side of the lorry could not be regarded as 'loose equipment' and the decision of the justices was right."

*Darling v. Burton* (1) was cited, and LORD GODDARD, C.J., said:

"In support of his argument that the boards should be regarded as loose equipment, counsel for the appellants relied on *Darling v. Burton* (1), a Scottish case, in which the question was whether the trays with which bakers' vans are fitted should be regarded as loose equipment or as part of the van. The court held that those trays, which are merely put in the van to contain the bread, should be regarded as loose equipment. I respectfully agree that the judgment of the Lord Justice-General, LORD CLYDE, sitting in Justiciary, was right."

Then (and this is, in my view, the important part) LORD GODDARD, C.J., said:

"The trays were no part of the van. They were shelves which were put into the van merely for holding the bread which was to be carried in the van. Their presence or absence made no difference to the van as a van, and they must necessarily be regarded as loose equipment. In fact, the presence of the shelves would tend to decrease, and not to increase, the load that was carried in the van, because, if the shelves were not in the van the bread could be packed much tighter than when it was placed in the ordinary manner on the shelves. In the present case the boards are affixed by means of slots to the sides of the van, with the result that the van is capable of carrying a much larger load . . . I think that if we held that the justices were wrong in this case and that the boards must be regarded merely as loose equipment, we would be opening a very wide door to evasions . . ."

It seems to me that, if one considers this section on the findings which I have arrived at, one has to consider whether this ballast block, fixed and fastened as it was on July 18, 1946, was a part of the vehicle. I am satisfied that, in the condition in which it was on that day, July 18, 1946, it was a part of the vehicle, and was necessary to or ordinarily used with the vehicle when working on the road.

That does not exhaust the matter, because there then follows what counsel for the defendants has called the negative part of the Road Traffic Act, 1930, s. 26:

" . . . but exclusive of the weight of water, fuel or accumulators . . . and of loose tools and loose equipment."

Counsel for the defendants suggests that this block was in fact "equipment".

In my view, it was not equipment. It was not "loose equipment". It was a part of the vehicle, and it was proper for that ballast block to be included in the weight unladen of the vehicle at that time.

*Judgment for the plaintiffs.*

Solicitors: *J. G. Barr* (for the plaintiffs); *Mawby, Barrie & Letts* (for the defendants).  
G.A.K.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNKEY AND PARKER, JJ.)

Apr. 21, 24, 1953

LESTER v. BALFOUR WILLIAMSON MERCHANT SHIPPERS, LTD.

*Food and Drugs—Misleading label—Sale by agents "for account of" foreign principal—Agents not sellers under contract—Agents not liable on that ground for "act or default"—Liability of sellers who have never had possession or right to possession—Pre-packed Foods (Weights and Measures: Marking) Order, 1950 (S.I. 1950, No. 1125), art. 6 (3).*

The respondents, B.W.M.S., Ltd., sold certain tins of foodstuffs, the labels on which did not bear a true statement of the minimum net weight of the contents of the tins. The tins were part of a consignment which the respondents sold to C.A., Ltd. "for account of our principal", the S. Canning Co., who carried on business in South Africa. The respondents were charged before justices with offences under art. 6 (3) of the Pre-packed Foods (Weights and Measures: Marking) Order, 1950, it being alleged that the infringement of the order was due to their "act or default".

HELD: that, on the true construction of the contract between the respondents and C.A., Ltd., the respondents were selling as agents for disclosed principals and were not the sellers under the contract, and that on that ground they were not liable under the order.

Per curiam: If the respondents had been the sellers under the contract, the fact that they never had had possession or right to possession of the goods would not have exempted them from liability.

CASE STATED by Hastings justices.

At a court of summary jurisdiction sitting at Hastings on Nov. 20, 1952, the appellant, Norman Phillips Lester, town clerk of Hastings, preferred seven informations against the respondents, Balfour Williamson Merchant Shippers, Ltd., charging that on Oct. 13, 1952, at seven addresses in Hastings and St. Leonards-on-Sea, they did sell by retail to Claude Greenwood Adams various numbers of tins of Sinovich brand beans in tomato sauce with Vienna sausages the labels on which did not bear a true statement of the minimum net weight of the contents of the said tins, contrary to the Pre-packed Foods (Weights and Measures: Marking) Order, 1950.

It was proved or admitted that on Oct. 13, 1952, Claude Greenwood Adams, an inspector of weights and measures for the county borough of Hastings, visited the premises of seven grocers where Sinovich brand beans in tomato sauce with Vienna sausages were displayed for sale and purchased one or more tins at each shop. At each shop he weighed the remainder of tins displayed for sale and of the 215 tins weighed, 159 were found to contain less than the stated weight of one pound, four ounces. The tins were part of a consignment of five hundred cartons of Sinovich brand beans in tomato sauce with Vienna sausages sold under a contract dated Oct. 31, 1951, to wholesalers, Charles Arkcoll, Ltd., by the respondents on account for their principals, the Sinovich Canning Company, Ltd., who carried on business in South Africa. Neither

the right to physical possession nor the right to take possession of the tins had been reserved to the respondents under the contract of sale. The tins were cleared through the customs and sold to retailers by Charles Arkcoll, Ltd.

On behalf of the appellant it was contended that the respondents had committed the act of selling, and that the fact that they had not had physical possession of the tins nor the right to take possession of them did not enable them to escape criminal liability for the sale of the goods which did not comply with the requirements of the Pre-packed Foods (Weights and Measures: Marking) Order, 1950. It was contended on behalf of the respondents that the mere act of selling was not sufficient to bring them within the provision in art. 6 (3) of the order that an offence against the order was due to their "act or default".

The justices dismissed the informations on the ground that the respondents had not been guilty of any "act or default" inasmuch as they had never had possession, nor the right to possession of the goods.

*Paul Wrightson* for the appellant.

*Crichton, Q.C.*, and *E. L. Gardner* for the respondents.

**LORD GODDARD, C.J.:** I am of opinion that this appeal must be dismissed. Though the court is deciding in favour of the respondents on entirely different grounds, I can well understand the decision of the justices, because, if there were any persons concerned in the sale of these goods whom it was shown had no opportunity for weighing them, it was the respondents.

The proceedings were taken under the Pre-packed Foods (Weights and Measures: Marking) Order, 1950, and that order incorporates in it what is generally referred to as the third-party procedure which appears in the Food and Drugs Act, 1938, and is now well known. By art. 6 it is provided:

"(1) A person against whom proceedings are instituted in respect of an infringement of any provisions of this order shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the infringement was due brought before the court in those proceedings and if, after proof of the infringement, the original defendant proves that it was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence . . . (3) Where it appears to the Board of Trade or any other authority entitled to institute proceedings for an infringement of this order that an offence has been committed in respect of which proceedings might be instituted for an infringement of this order against some person and the Board or that other authority are reasonably satisfied that that offence was due to an act or default of some other person and that the first-mentioned person could establish a defence under para. (1) of this article they may cause proceedings to be instituted against that other person without first causing proceedings to be instituted against the first-mentioned person . . ."

The retailer, who would be the person ordinarily proceeded against first, can give the specified notice and bring in a third party, and then he would have to establish the defence that that third party was liable and he himself had exercised all reasonable care, and under this order the local authority, without considering whether the retailer or the wholesaler has exercised reasonable care, can go straight to any person in the chain and take proceedings against



him. When proceedings are taken under these Acts, the act or default which is proved in nearly all the cases is the mere act of selling a defective article. It does not matter whether the person charged has been guilty of negligence or not. He may be acting in the most perfect good faith; the order makes the sale of the defective article, whatever the defect, an offence. Under the present order if a person sells a tin under weight, he is liable, but he may be able to show that somebody else is liable and that that person's act or default is the real cause of the wrongful sale. It is enough for him to show that the goods were sold to him by somebody else under the description under which he has sold them.

In the court below the only point taken on behalf of the respondents was that the mere act of selling was not sufficient to bring them within the words "act or default" in art. 6 (3), and no other act or default had been or could be committed by the respondents as they had never had physical possession or the right to physical possession of the goods. The justices were of opinion that it must be proved to the satisfaction of the court that the deficiencies alleged were committed by either the act or the default of the respondents, and on the evidence for the prosecution they were satisfied that the respondents never had physical possession of the goods or the opportunity of taking physical possession and in consequence it could not be said that they committed any act or default that would have justified them (the justices) calling upon the respondents, and they, accordingly, dismissed the summonses.

With all respect to the justices—although I can well understand their feeling that it was hard to convict the respondents, who never had a chance of examining the goods—if the respondents had been the sellers, they would have been liable, but reference to the contract shows that the respondents were not the sellers, but were simply acting as brokers. The contract starts in this way:

"Messrs. Charles Arkcoll, Ltd. Dear Sirs, We have this day sold to you for account of our principal five hundred cartons . . .",

of these goods, and it discloses the principals as being Messrs. Sinovich of South Africa. That shows that the respondents were not the sellers. They were selling on behalf of disclosed principals, and they were making a c.i.f. contract under which there was to be payment of cash against documents. The marine and war risk insurance was to be covered by the sellers for the c.i.f. contract price. The respondents, undoubtedly, handled some of the documents and would pass them on, but they would get no right to take possession of the goods or examine them.

It has been argued that the respondents cannot be heard to say they did not sell as principals. Many years ago, one hundred years ago, when *Lennard v. Robinson* (1) was decided, that might have been a very good argument, but the law has moved a long way since then. The House of Lords has said expressly that *Lennard v. Robinson* (1) is not correct law, and it seems to me now that the cases show that what has to be found is whether in the contract the person signing as seller or buyer, or whatever it may be, is signing as principal or whether he is signing as agent. It does not matter whether the qualification of his liability, if he be only an agent, is found only in the body of the document or whether it is found by words added afterwards for signature. ATKIN, L.J., put it extremely clearly in *Ariadne S.S. Co., Ltd. v. J. McKelvie & Co.* (2):

"But when the assent of the party sought to be charged is proved, it

(1) (1855), 5 E. & B. 125.

(2) [1923] A.C. 492, *affg. s.c. sub nom. Ariadne S.S. Co., Ltd. v. McKelvie (J.) & Co.*, [1922] 1 K.B. 518, 535.

matters not what the terms of the contract expressed in the body of the document may be. Signature unconditionally appended is proof of unconditional assent to the terms recorded in the body of the contract. If the body of the contract records that the signer is a party, or leaves the name of the party to be inferred from the signature, the signature will be proof that the signer has assented to a contract made with him. The contract may, however, record that the contract is made between A. and B. acting by his agent C. and may be signed by C., in which case C. has assented to a contract between A. and not C. but C.'s principal B. But the assent signified by the signature may be qualified so as to show that the signer is not assenting unconditionally to the contract, but is assenting in a representative capacity on behalf of a principal . . . Some confusion, I think, has been introduced into the cases by not sufficiently distinguishing between cases of construction of the body of the contract and cases turning on the proof of assent in the signature. There can be little doubt that the law on the matter has not been uniformly stated and that it has required some time to settle it. What words in the body of the contract are sufficient to negative personal liability, and what words qualifying signature are sufficient to negative assent as principal were, up to 1876, in doubt. But since June, 1876, when the case of *Gadd v. Houghton* (1) was decided in the Court of Appeal by JAMES, MELLISH and BAGGALLAY, L.JJ., and QUAIN and ARCHIBALD, JJ., I have always understood the law to be that the words 'on account of' and the words 'as agents' are conclusive, when qualifying the signature to negative liability as principal, and that whether the actual principal is disclosed or not . . . As is plain from cases prior to *Gadd v. Houghton* (1) and from the judgment of ARCHIBALD, J., in that case, the qualification of the signature 'as agents' had been usual before 1876 to negative personal liability. That decision merely gave it final authority. To my mind it is irrelevant to consider whether the qualifying words occur more than once in the document on the principle that 'what I say three times is true', but what I say once is doubtful. If the words qualify the signature they qualify the assent and nothing more matters. It follows from what I have said that in my opinion the case of *Lennard v. Robinson* (2), decided in the year 1855 while the law was still unsettled, was wrongly decided, and should no longer be treated as an authority."

*Gadd v. Houghton* (1), to which the learned lord justice in that case referred, was a case where fruit brokers in Liverpool gave a fruit merchant the following sold-note: "We have this day sold to you on account of James Morand & Co., Valencia, two thousand cases Valencia oranges, of the brand James Morand & Co., at 12s. 9d. per case free on board . . ." and signed it without any addition. The purchaser having brought an action against the brokers for non-delivery of the oranges, it was held, reversing the decision of the Exchequer Division, that the words "on account of James Morand & Co.", showed an intention to make the foreign principals, and not the brokers, liable, and that the brokers were not liable upon the contract. That case was not only approved and explained by ATKIN, L.J., but, when the *Ariadne* case (3) went to the

(1) (1876), 1 Ex.D. 357.

(2) (1855), 5 E. & B. 125.

(3) [1923] A.C. 492, *affg. s.c. sub nom. Ariadne S.S. Co., Ltd. v. McKelvie (J.) & Co.*, [1922] 1 K.B. 518, 535.

House of Lords [reported under the title of *Universal Steam Navigation Co. v. J. McKelvie & Co.* (1)] *Gadd v. Houghton* (2) was expressly approved, and that must be taken to be the law.

Therefore, it follows that the respondents did not acquire rights under this contract nor incur liabilities as between themselves and the buyers. They could not have brought an action against Charles Arkcoll, Ltd., because they would have been met at once with the statement: "You were not the principals in this contract. There is no contractual nexus between us because you contracted as agents for the Sinovich company". In the same way, the respondents could not have been made liable by Charles Arkcoll, Ltd. under the contract because there was no contractual nexus—they were not the sellers. Therefore, it seems to follow clearly that there was no act or default on the part of the respondents causing the retailers to be in possession of these goods which were under weight when the inspector bought them. If they had been the sellers, even though they had never handled the goods, they would have been liable, but, as they were never the sellers, I cannot see how it can be said that there was any act or default on their part which made them liable. Counsel for the appellant has argued that the respondents held an import licence which enabled Sinovich Canning Co. to send the goods in, and, therefore, they must be liable, but the court is unable to accept that argument. As has been pointed out, the goods were imported when there was an open licence, but we need not go into that because, in my opinion, clearly that could make no difference. The consequence is that the justices came to a right decision, though on wrong grounds. I do not want it to be thought that this court is departing from the long line of authorities which shows that in these cases where mens rea is not an element of the offence, or, as I prefer to put it, where the doing of the act itself supplies the mens rea, it matters not whether the person knew he was committing an offence, or intended to commit an offence, or had an opportunity of finding out whether he was committing an offence. If the respondents had been the sellers in the present case they would have been liable, but I am very glad that the decision we are able to give is one which seems to me to be consistent with justice. It is not necessary for the court to pronounce on the question whether Charles Arkcoll, Ltd. would have had any defence in this case. I am not going into that point because it does not concern the court. The only question which concerns the court is whether the respondents were shown to be guilty of an act which caused these offences. In my opinion, they were not, and, therefore, the justices came to a right decision, though for the wrong reasons, and this appeal must be dismissed.

LYNSKEY, J.: I agree.

PARKER, J.: I agree.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *N. P. Lester*, town clerk, Hastings (for the appellant); *Neve, Beck & Co.* (for the respondents).

T.R.F.B.

(1) [1923] A.C. 492, *affg. s.c. sub nom. Ariadne S.S. Co., Ltd. v. McKelvie (J.) & Co.*, [1922] 1 K.B. 518, 535.

(2) (1876), 1 Ex.D. 357.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PARKER, JJ.)

Apr. 16, 1953

DAY v. HARRIS

*Small Tenement—Service of notice—Explanation given to tenant by process server—Inability of tenant to understand—Validity of notice—Small Tenements Recovery Act, 1838 (1 and 2 Vict., c. 74), ss. 1, 2.*

By s. 1 of the Small Tenements Recovery Act, 1838, a written notice in the form set out in the schedule to the Act of intention to proceed to recover possession of the house and signed by the landlord or his agent must be served on the tenant whom it is sought to eject. By s. 2 the person serving the notice is required to read it over to the tenant and explain to him the purport and intent thereof. The requisite notice under the Act was served personally on a tenant, and read over to him by the process server, who four times explained its purport, but the tenant, a man of 76 who suffered from delusions, was unable to understand it. The stipendiary magistrate held that, as the tenant had not understood the meaning of the notice, the Act had not been complied with, and refused to order an ejectment warrant to issue.

HELD: that the Act did not provide that it must be proved that the person to whom the notice was explained understood the explanation; that there had been sufficient compliance with the provisions of the Act; and that the case must be remitted to the magistrate with the opinion of the court to that effect.

CASE STATED by the stipendiary magistrate for South Staffordshire sitting at West Bromwich.

At a court of summary jurisdiction sitting at West Bromwich in October, 1952, proceedings under the Small Tenements Recovery Act, 1838, for an ejectment warrant were taken by the appellant, John Maxwell Day, on behalf of the West Bromwich Corporation, against the respondent, Henry Harris, for possession of one of the corporation's houses.

By virtue of s. 1 of the Act it is necessary to serve on the tenant a written notice in the form set out in the schedule to the Act, signed by the landlord or his agent, of the intention to proceed to recover possession of the house. By s. 2 the person serving the notice is required to read over the same to the person served and explain the purport and intent thereof. This section also provides alternative methods of service if the tenant cannot be found. Before the magistrate it was proved that the requisite notice had been personally served on the tenant, and read over to him, and that the purport and intent thereof had been explained to him. The person giving evidence as to the service, however, further said that, in his opinion, the tenant was incapable of understanding, and had not, in fact, understood, the purport and intent of the notice.

The stipendiary magistrate found that the provisions of the Act had not been complied with in that the notice could not be said to have been explained if the tenant had not understood it, and, therefore, he dismissed the application. The appellant appealed.

L. A. Blundell for the appellant.

The tenant did not appear and was not represented.

LORD GODDARD, C.J.: This is a Case stated by the learned stipendiary magistrate for South Staffordshire, before whom proceedings were taken for the recovery of a small house under the Small Tenements Recovery Act, 1838.

Parliament has not thought fit to apply the Rent Restriction Acts to houses which are owned by local authorities, and, therefore, if a local authority takes proceedings under the Act of 1838 to recover possession, the court has no





## COURT OF APPEAL

(DENNING AND JENKINS, L.JJ., AND VAISEY, J.)

Apr. 24, 1953

HAVANT AND WATERLOO URBAN DISTRICT COUNCIL v. PAYNE  
(VALUATION OFFICER) AND ANOTHER

*Rates—Assessment—Deduction from gross value—Rate, charge, or assessment made by commissioners of sewers “or other like authority”—Sea defence rate levied by urban district council—Rating and Valuation Act, 1925 (15 and 16 Geo. 5, c. 90), s. 22 (1) (a).*

An urban district council constructed a wall for the defence of part of its district from the sea under powers conferred by a private Act, and, to meet the cost, levied a sea defence rate on the owners of properties in the area benefited as specified in the Act.

**HELD:** the average annual amount of the sea defence rate was not deductible from the gross value of a hereditament subject thereto under s. 22 (1) (a) of the Rating and Valuation Act, 1925, since the council were not commissioners of sewers “or other like authority” (which meant an ad hoc authority) making a “rate, charge or assessment . . . in respect of” a wall for the benefit of hereditaments affected within the meaning of that paragraph.

**CASE STATED** by the Lands Tribunal.

The ratepayer owned and occupied a shop known as “Eastwards”, Creek Road, Hayling Island, which was the subject of a proposal by the valuation officer, dated Jan. 14, 1952, to increase the assessment from £42 gross value and £32 rateable value to £75 gross value and £60 rateable value. The ratepayer objected to the proposal and the valuation officer appealed against the objection. The ratepayer contended, inter alia, that, in addition to the statutory percentage deduction from the gross value to ascertain the rateable value of the shop, under s. 22 (1) (a) and sched. II of the Rating and Valuation Act, 1925, there ought also to be deducted the average annual amount of a sea defence rate which was payable to Havant and Waterloo Urban District Council in respect of the hereditament under the Havant and Waterloo Urban District Council Act, 1947, such rate being “a rate, charge or assessment made by any commissioners of sewers or other like authority” in respect of a wall “for the benefit of the hereditament” within the meaning of s. 22 (1) (a). The local valuation court held that the sea defence rate, which amounted to £9, was deductible, and determined the assessment at £75 gross value and £51 rateable value. The Lands Tribunal dismissed the appeal of the council against that decision. The council appealed and contended that the sea defence rate was in respect of a capital sum, that the council were not “any commissioners of sewers or other like authority” within the meaning of s. 22 (1) (a), and, that therefore, the sea defence rate was not deductible.

*Rowe, Q.C., and W. L. Roots* for the appellant council.

*Maurice Lyell* for the respondent valuation officer.

*Widgery* for the respondent ratepayer.

**DENNING, L.J.:** Hayling Island is a popular seaside resort which was at one time liable to flooding by the sea. In December, 1945, the defences were breached by the sea, and much property on the island was flooded. Thereupon the local council, Havant and Waterloo Urban District Council, obtained permission to start building a sea wall. They borrowed money for the purpose from the Public Works Loan Board, and the position was put on a statutory footing by the Havant and Waterloo Urban District Council Act, 1947. By that Act the council were empowered to make a wall for defence against the sea, and

were also empowered to charge the cost against the owners of the properties which were benefited by it. The particular part of Hayling Island which was benefited by the wall was marked out by the Act, and it was enacted that the owners of the benefited part should pay to the council the cost of construction. They were to pay it by means of a sea defence rate, and there was a provision that, if an owner of land wanted to redeem the amount of the rate, he could redeem it by paying a capital sum to the council. That was in 1947. The sea wall was completed, and the sea defence rate became payable.

The question which we have to determine is what is the effect of the sea defence rate on the general rate leviable in the district. We have a test case before us. A shop in Hayling Island known as "Eastwards", Creek Road, Hayling Island, is assessed at £75 gross value. If the ordinary percentage specified in the Rating and Valuation Act, 1925, is deducted, the rateable value of the shop will be £60, but the ratepayer has to pay a sea defence rate of £9, and he contends that he is entitled to deduct that £9 from the £60, making a rateable value of only £51. The council say that he is not entitled to deduct the £9. In this district the general rate is 23s. in the £, and it is very greatly to the benefit of the ratepayer to get the amount reduced to £51. If he succeeds in his contention it will mean that, by paying a sea defence rate of £9, he will pay £10 7s. less on his general rate. Thus, on an ordinary rateable value of £60, he would have to pay £69, but on £51 he would only have to pay £58 13s. Even adding on the £9, that only makes £67 13s. in all, so that he is £1 7s. in hand compared with other ratepayers. In short, he pays nothing for the sea wall, but gets a bonus of £1 7s. at the expense of the other ratepayers. I need hardly say that that would appear to be contrary to the intention of Parliament when it passed the Act of 1947, for it was quite clear that Parliament intended that the owners of these benefited properties should pay for the sea wall.

The question depends on s. 22 (1) (a) of the Rating and Valuation Act, 1925, which provides that in the case of certain hereditaments, of which this is one,

" . . . there shall be deducted from the gross value of the hereditament an amount representing the deduction specified with respect to hereditaments of that class in the second column of the [table contained in Part I of sched. II to the Act] and also, in the case of a hereditament subject to any rate, charge, or assessment made by any commissioners of sewers or other like authority in respect of any drainage, wall, embankment, or other work for the benefit of the hereditament (not being a usual tenant's rate), such further amount as represents the average annual amount of that rate, charge or assessment . . ."

It is said on behalf of the ratepayer that the sea defence rate of £9 is a rate made by "commissioners of sewers or other like authority in respect of" a wall "for the benefit of the hereditament" and, therefore, it is to be deducted. On the other hand, counsel for the local council has urged that, in ascertaining rateable value, the underlying principle is that the ratepayer can deduct maintenance charges, but not charges which are solely for capital improvement, and that this was a charge of a capital nature. He gives as an instance the case of a road taken over by the local authority. The cost of making up the road has to be borne by the owners of adjoining property, but they are not allowed to deduct it from their assessments. So here, he says, the owners of the benefited property should not be allowed to deduct what is really a capital charge.

I prefer to express no opinion on that point. I am content to decide this

case on the narrow point that the council are not "commissioners of sewers or other like authority" within the meaning of the Rating and Valuation Act, 1925, s. 22 (1) (a). The words in the Act are not "or other authority", but "or other *like* authority". In my judgment, those words do not include the local authority themselves. They refer to ad hoc authorities, i.e., authorities which are entrusted by Parliament with a specific task such as draining a district or controlling a catchment area. An ad hoc authority often has to expend capital moneys but it also has to maintain works for the benefit of its district, and the rate which it levies is much more for maintenance charges and interest charges than for capital repayment. It is quite understandable that such a rate should be deducted in order to ascertain rateable value. But this sea defence rate is not a rate of that kind. This urban district council is not an ad hoc authority at all. It is merely the local authority carrying on many activities in its district.

In my opinion, therefore, the sea defence rate cannot be deducted because it is not made by "commissioners of sewers or other like authority". That is a sufficient ground for determining this appeal. Any other view would mean that the charge which Parliament clearly intended in the Act of 1947 should fall on the owners of these particular houses would, in effect, be transferred from the owners of those houses to the rest of the ratepayers of the local district and of the whole county. The outside ratepayers would be subsidising the owners of the benefited houses whereas Parliament clearly contemplated that the owners of the houses should pay for the wall themselves. There is one final point. If there is any conflict between the private Act and the public Act, the private Act should prevail. I am quite satisfied that the intention of Parliament in the private Act was that the sea defence rate should be paid by the owners, and that it should not be deducted in ascertaining the rateable value. I would, therefore, allow the appeal.

JENKINS, L.J.: I agree that this appeal should be allowed. The short point is whether the sea defence rate is a

"rate, charge, or assessment made by any commissioners of sewers or other like authority in respect of any drainage, wall, embankment, or other work for the benefit of the hereditament"

within the meaning of s. 22 (1) (a) of the Rating and Valuation Act, 1925. The same Act in s. 68 (1) defines the expression "rate", and provides (by para. (a)) that the definition is not to include

"any rate which is assessed under any commission of sewers or in respect of any drainage, wall, embankment, or other work for the benefit of the land."

That formula would extend to any rate assessed in respect of any of the matters referred to, not only by any commissioners of sewers, but also by any other body whatsoever having the necessary lawful authority to make the rate. The language of s. 22 (1) (a) shows a significant difference, for there the deduction is allowed, not simply in respect of

"any rate, charge, or assessment . . . in respect of any drainage, wall, embankment or other work",

but only in respect of rates, charges or assessments of the descriptions mentioned which are made by "any commissioners of sewers or other like authority". Those words in the sub-section limit the rates, charges, and assessments which are deductible, not merely by reference to the matters in respect of which



they are made, but also by reference to the character of the authority by which they are made.

The question, then, in the end resolves itself into whether the urban district council in this case is an "other like authority" within the meaning of s. 22 (1) (a). In my view, the expression "other like authority" should not be construed as meaning any other body authorised to perform like statutory functions. In its primary significance, I do not think the language is apt to convey that meaning. Moreover, if that was the meaning of the words "other like authority", the whole of the reference to "any commissioners of sewers or other like authority" would, in effect, be otiose, for it would extend to any and every kind of body or authority which has the necessary legal power to make rates, charges, or assessments of the descriptions mentioned. I think the words "other like authority" mean a similar body authorised to make rates, charges, or assessments of those descriptions. The body making the rate, charge, or assessment must be an authority comparable in character to commissioners of sewers. In my view, it is impossible to say that the urban district council here complies with that requirement.

I should add that, as pointed out by counsel for the local council in reply, the words "commissioners of sewers or other like authority" would be a most remarkable expression to use if it was intended to include in that expression the local authority itself within whose area the hereditament to be valued is situate. Accordingly, in the view that I take, the sea defence rate in this case is not a rate, charge, or assessment which is deductible under the provision of s. 22 (1) (a), and on that ground, in my opinion, the appeal should be allowed.

**VAISEY, J.:** I have come to the same conclusion on the grounds already stated by my Lords. I am myself quite satisfied that the result accords with the plain sense and reason of the matter, and I agree that this appeal should succeed.

*Appeal allowed.*

Solicitors: *Lees & Co.*, agents for *B. R. W. Gofton*, clerk of the council (for the council); *Solicitor of Inland Revenue* (for the valuation officer); *Arthur S. Joseph & Cates*, agents for *MacDonald, Jacobs & Oates*, Petersfield (for the ratepayer).

F.A.A.

**COURT OF CRIMINAL APPEAL**

(LORD GODDARD, C.J., LYNKEY AND PARKER, JJ.)

Apr. 27, 1953

REG. v. WEBB

*Criminal Law—Sentence—Breach of order of probation or conditional discharge—Separate sentence to be passed—Criminal Justice Act, 1948 (11 and 12 Geo. 6, c. 58), s. 12 (1).*

In the case of a breach of a probation order or order of conditional discharge a separate sentence ought always to be passed so that the original order may rank as a conviction under the proviso to s. 12 (1) of the Criminal Justice Act, 1948. Only in exceptional cases should the sentences for the original and the subsequent offences be made to run concurrently.

APPEAL against sentence.

The appellant pleaded Guilty at Essex Quarter Sessions to three counts charging housebreaking and larceny. He asked for twenty-eight outstanding offences and a breach of probation to be taken into account, and received sentences of five years' imprisonment, to run concurrently, on each count.

No counsel appeared.

LORD GODDARD, C.J., read the following judgment of the court. The appellant pleaded Guilty at Essex Quarter Sessions to three charges of housebreaking and larceny, and twenty-eight other offences were taken into consideration. In addition—and this is what makes this case one of some importance—a breach of probation was taken into consideration. The learned deputy chairman had his attention brought to the breach of probation and said that he was taking it into consideration. He passed three sentences of five years' imprisonment, all being concurrent, but not one of those sentences related to the breach of probation.

The court desires to call the attention of all the courts exercising criminal jurisdiction to a matter which arises under s. 12 of the Criminal Justice Act, 1948. By sub-s. (1) of that section it is provided that a conviction for which the offender is either placed on probation or is granted an absolute or a conditional discharge shall be deemed not to be a conviction for any purpose other than the purposes of the proceedings in which the order is made and of any subsequent proceedings which may be taken against him under the foregoing provisions of the Act. The sub-section contains a proviso that, whenever an offender, who was aged not less than seventeen at the time of the conviction for which he was placed on probation or conditionally discharged, is subsequently sentenced for that offence under that part of the Act, that is to say, under s. 8, the provisions of s. 12 (1) shall cease to apply to the conviction. One of the effects of these provisions is that a conviction resulting in an order of probation or conditional discharge cannot rank as a conviction under s. 21 (1) (b) of the Act for the purpose of imposing thereafter a sentence of corrective training, unless by reason of a subsequent offence a sentence is imposed for the earlier one.\*

It appears that it happens not infrequently that when a person subject to one of these orders is brought up for a subsequent offence the court sentences him for the latter offence and at the same time says that it takes into account the breach of the probation order or of the conditional discharge. That was

\* See *Rez v. Stobart* 115 J.P. 561; ([1951] 2 All E.R. 753).

done here because the appellant was on probation at the time he committed the offences. It must, however, be borne in mind that the practice of taking other offences into account, however beneficial and advantageous to an offender, is based merely on convention and has no statutory foundation. It arose entirely from a desire to give prisoners a clean sheet when they came out of prison and to obviate the necessity or chance of their being re-arrested and charged and again returned to prison. But a sentence which the court states takes other offences into consideration is still, in law, only passed for the offence with which the court is actually dealing. Thus, if a conviction only carries a sentence of, say, twelve months, the court cannot pass a larger sentence by taking other offences into consideration: see *Rex v. Tremayne* (1) and *Rex v. Hobson* (2). It has also been held that when the conviction has been quashed on appeal the prisoner may be subsequently indicted and tried for offences which the court took into consideration as there had been no conviction of those offences and so no plea of autrefois convict could be raised: *Rex v. Nicholson* (No. 2) (3); *Rex v. Neal* (4)).

It is, therefore, undesirable, and, indeed, wrong, to take breaches of probation or of conditions of discharge into consideration. They should be separately dealt with and separate sentences passed so that the original offences may rank as convictions, as they will by virtue of the proviso to s. 12 (1). There may be cases in which a court would think fit to make the sentences for the original and subsequent offences concurrent, but it would seem desirable that this power should only be used exceptionally. It is most important that an offender should be made to realise that discharge, whether on probation or conditionally, is not a mere formality, and that a subsequent offence committed during the operative period of the order will involve punishment for the crime for which he was originally given the benefit of this lenient treatment. The court will now impose a sentence for the breach of probation so that it may in future rank as a conviction. They will make the sentence on the first count one of three years, on the other two counts the sentences will be five years, and for the breach of probation the sentence will be two years, all the sentences to run concurrently. The appeal is dismissed.

*Sentence varied.*

T.R.F.B.

(1) (1932), 23 Cr. App. R. 191.

(2) (1942), 29 Cr. App. R. 30.

(3) (1947), 32 Cr. App. R. 127.

(4) 113 J.P. 468; [1949] 2 All E.R. 438; [1949] 2 K.B. 590.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PARKER, JJ.)

Apr. 27, 1953

LINCOLN COUNTY COUNCIL (PARTS OF LINDSEY) v. HENSHALL  
AND OTHERS

*Town and Country Planning—Enforcement notice—Development prior to July 1, 1948, complained of—No development after that date alleged—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 23 (1), s. 75 (1).*

A local planning authority served enforcement notices under s. 23 (1) of the Town and Country Planning Act, 1947, on the owners and an occupier of certain fields requiring them to discontinue the use of the fields as sites for any structure or structures adapted or used for dwelling or camping purposes or for any structures ancillary thereto. The notices were intended to refer to development prior to July 1, 1948 (the date on which the Act came into force) and no complaint was made of any development since that date.

Held: that a notice under s. 23 (1) could refer only to development carried out after July 1, 1948, and, therefore, the notices in question were bad and could be quashed by justices under s. 23 (4).

CASES STATED by county of Lincoln (Parts of Lindsey) justices.

At a court of summary jurisdiction sitting at Skegness on Dec. 10, 1952, the respondents, Louis Hector Henshall, the Nottingham Brewery Co., Ltd., and the Wallace Holiday Camp, Ltd., preferred complaints under s. 23 (4) of the Town and Country Planning Act, 1947, against the appellants, the council of the county of Lincoln, the local authority for the purposes of the Act, that on May 25, 1951, they had served on the first two respondents, and on June 25, 1951, on the third respondents, enforcement notices under s. 23 (1) of the Town and Country Planning Act, 1947, requiring them to discontinue, or secure the discontinuance of, the use of certain fields as sites for any structure or structures adapted or used for dwelling or camping purposes or for any structures ancillary thereto.

It was admitted or proved that the appellants served an enforcement notice on each of the respondents, and that the first two respondents were the owners, and the third respondents were the occupiers, of the land referred to in the notices. The development to which the notices were intended to refer occurred prior to July 1, 1948, and no complaint was made of any development after that date.

It was contended on behalf of the respondents that the notices were bad in law and of no effect, since they did not specify any development complained of after July 1, 1948, and that s. 75 of the Town and Country Planning Act, 1947, did not avail the appellants as it merely provided the machinery whereby an enforcement notice could be served in respect of such development. It was contended on behalf of the appellants that the notices specified the development which was alleged to have taken place without planning permission, that it was not necessary for the date when such development occurred to be specified, and that the notices were effective.

The justices quashed the notices as being bad in law and the appellants appealed.

*Percy Lamb, Q.C., and W. L. Roots for the appellants.*

*Harold J. Brown for the respondents.*

LORD GODDARD, C.J.: These are three Cases which raise exactly the same point and are stated by justices for the Parts of Lindsey before whom complaints were preferred by the respondents against the appellants, the local



planning authority for the purposes of the Town and Country Planning Act, 1947, for that they had served on the respondents under the Town and Country Planning Act, notices which, they alleged, were bad.

Section 23 (1) of the Town and Country Planning Act, 1947, provides:

"If it appears to the local planning authority that any development of land has been carried out after the appointed day without the grant of permission required in that behalf under this Part of this Act . . . the local planning authority may within four years of such development being carried out, if they consider it expedient so to do having regard to the provisions of the development plan and to any other material considerations, serve on the owner and occupier of the land a notice under this section."

Sub-section (2) provides:

"Any notice served under this section (hereinafter called an 'enforcement notice') shall specify the development which is alleged to have been carried out without the grant of such permission as aforesaid . . . and may require such steps as may be specified in the notice to be taken . . . for restoring the land to its condition before the development took place . . . and in particular any notice may, for the purpose aforesaid, require the demolition or alteration of any buildings or works, the discontinuance of any use of land, or the carrying out on land of any building or other operations."

By sub-s. (4):

"If any person on whom an enforcement notice is served under this section is aggrieved by the notice, he may, at any time within the period mentioned in the last foregoing sub-section, appeal against the notice to a court of summary jurisdiction for the petty sessional division or place within which the land to which the notice relates is situated; and on any such appeal the court—(a) if satisfied that permission was granted under this Part of this Act for the development to which the notice relates, or that no such permission was required in respect thereof, or, as the case may be, that the conditions subject to which such permission was granted have been complied with, shall quash the notice to which the appeal relates . . ."

That deals with development which has been carried out after the appointed day, but there is a provision in s. 75 which enables enforcement notices to be served in respect of the contravention of previous planning control. Therefore, if any work has been carried out in contravention of previous planning control, the same class of notice containing the same requirements can be served as under s. 23. Section 75 (5) provides:

"In relation to an enforcement notice served by virtue of this section, s. 23 (4) of this Act shall have effect as if for para. (a) thereof there were substituted the following paragraph:—' (a) [the court of summary jurisdiction], if satisfied that the works or use to which the notice relates are not works or a use to which s. 75 of this Act applies, shall quash the notice to which the appeal relates '."

An enforcement notice is not a statutory notice, but it has to comply with the provisions of the Act. The notices in the present case were headed: "The Town and Country Planning Act, 1947" (which did not come into force until July 1, 1948). It was alleged that in certain fields

"(1) . . . development has been carried out (within the meaning of

the above Act) by changing the use of the said land from use for the purpose of agriculture to use as a site or as sites for structures adapted or used for dwelling or camping purposes and other structures ancillary thereto; (2) no planning permission has been granted for the said development; (3) the county council of Lincoln, Parts of Lindsey, consider it expedient to serve this enforcement notice upon you pursuant to s. 23 of the Town and Country Planning Act, 1947."

On the back of the notices was printed s. 23 (3) and (4). There was no reference there to s. 75, and, presumably, therefore, on the service of the notices alleging that development had been carried out after the appointed day the provisions of s. 23 (4) applied, notice of appeal could be given, and, among other things, the court could quash the notices if it appeared that no permission was required in respect thereof.

When the case came before the justices it was admitted that the notices were intended to refer to a development which had occurred before July 1, 1948. Obviously, therefore, s. 23 did not apply because that section only refers to development of land which has been carried out after July 1, 1948. But it is now said that, under s. 75, if development has been carried out in contravention of previous planning permission, an enforcement notice must be served, and then the provisions of s. 75 apply and the justices can only quash the order if they are satisfied that the works or a use to which the notice relates are not works or a use to which s. 75 applies. No reference was made to s. 75, and an enforcement notice, if it is given by virtue of s. 75, must refer, not to development carried out after the appointed day without regard to permission, but to development carried out in contravention of previous planning control, which is quite a different thing. On the hearing of the case the respondents showed that the work was not in contravention of previous planning control. These notices were intended to refer to work which was done before July 1, 1948, and so should be under s. 75 and not under s. 23, that is, they must be given under the machinery of s. 23 as applied by s. 75—doing work in contravention of previous planning control, and not doing work without having obtained planning permission.

Counsel for the appellants objects that the justices had no power to quash because we have held in *Mead v. Plumtree* (1) that the provisions of s. 23 are such that an appeal is not given under s. 23 (4) on the ground that the notice is bad, but the justices can only quash or vary the notice on certain specified grounds. Otherwise the objection has to be taken when a person is prosecuted. The justices had power to quash in the present case because no such permission was required in respect of work which was done before July 1, 1948. If that work was done in contravention of planning control which existed at the time it was done, that should have been alleged and the notices should have so specified. The notices served would only be appropriate if work had been done after July 1, 1948, without obtaining permission. For these reasons, the justices came to a perfectly proper decision and the appeal must be dismissed.

**LYNSKEY, J.:** I agree.

**PARKER, J.:** I agree.

*Appeal dismissed.*

Solicitors: *Taylor, Jelf & Co.*, agents for *H. Copland*, clerk to Lincoln County Council (for the appellants); *Clifford-Turner & Co.*, agents for *Frearson, Son & Sayer*, Skegness (for the respondents).

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PARKER, JJ.)

DEFIANT CYCLE CO., LTD. AND OTHERS *v.* NEWELL

Apr. 28, 1953

*Statutory Instrument—Validity—Schedules not printed—Certificate of exemption—“Certificate”—Letter from Ministry of Supply to editor at Stationery Office—Effect of failure to print—Defence under statute—Statutory Instruments Act, 1946 (9 & 10 Geo. 6, c. 36), s. 2 (1), s. 3 (2)—Statutory Instruments Regulations, 1947 (S.I., 1948, No. 1), reg. 7.*

The appellants were convicted before justices of selling iron and steel in excess of the maximum prices permitted by the Iron and Steel Prices Order, 1951, as amended by subsequent price orders and set out in deposited schedules thereto. A copy of the order was sent by an assistant secretary at the Ministry of Supply to the editor of statutory instruments at the Stationery Office together with a letter stating that “the deposited schedules had been certified under reg. 7 [of the Statutory Instruments Regulations, 1947] to be exempted from printing and sale as part of the copies of the instrument.”

HELD, that this letter did not constitute a certificate within the meaning of reg. 7 and so the Crown was not exempted from printing the deposited schedules and the provisions of s. 2 (1) of the Statutory Instruments Act, 1946, applied to them, and that, as the Crown had not proved that reasonable steps had been taken to bring “the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged” within the meaning of s. 3 (2) of the Act, the appellants were entitled to rely on the defence provided by s. 3 (2) and the convictions must be quashed.

*Quære* (per PARKER, J.): (i) whether the effect of a contravention of s. 2 (1) of the Act of 1946 in not causing to be printed a statutory instrument which was required to be printed was to render the instrument wholly invalid; (ii) whether the defence under s. 3 (2) of the Act of 1946 was available in every case, whether a statutory instrument was required to be printed or not.

## CASES STATED by Middlesex justices.

On Oct. 16, 1952, at a court of summary jurisdiction sitting at Tottenham, informations were preferred by the respondent, Leonard Newell, a higher executive officer of the Ministry of Supply, against each of the appellants, the Defiant Cycle Co., Ltd., and one MacNay and one Simmonds, directors of the company, that they on divers dates between May 18, 1951, and Aug. 30, 1951, sold steel of a class mentioned in the schedule to the Iron and Steel Prices Order, 1951 (S.I., 1951, No. 252), as amended by the Iron and Steel Prices (No. 2) Order, 1951 (S.I., 1951, No. 1423) and the Iron and Steel Prices (No. 3) Order, 1951 (S.I., 1951, No. 1549), at a price which was in excess of the scheduled maximum price, contrary to art. 1 (A) of the said order, as amended, and to reg. 55AB of the Defence (General) Regulations, 1939.

It was proved or admitted that the appellant company carried on business as dealers and merchants in steel; that the company made the sales referred to in the informations; that, on the publication of the Iron and Steel Prices Order, 1951, and the said amending orders, the Minister of Supply caused to be distributed to each of the regional offices of the Ministry in the United Kingdom one copy of the schedules referred to in the orders; that the original signed deposited schedules were retained by him and were available for inspection by the public at Steel House, London; that none of the deposited schedules was printed by the Queen's printer; that one Mrs. Silverston, an assistant secretary in the Ministry of Supply, whose duties included the making of arrangements for the printing of statutory instruments made by the Minister, decided, having regard to the provisions of the Statutory Instruments Regulations, 1947, reg. 7,

that the printing and sale of the schedules referred to in each of the orders was unnecessary; that, in so deciding, she had regard primarily to the bulk of the schedules, secondly, to the fact that copies thereof were to be made available through the regional offices, and, thirdly, to the fact (of which she was aware) that trade associations would be distributing to the trade copies of the schedules, or, at least, of such parts thereof as related to types of iron and steel most in demand; that Mrs. Silverston, when sending a copy of each of the said statutory instruments, also sent a letter to the editor of statutory instruments, but that, save as aforesaid, the Minister of Supply did not give a certificate in writing in respect of the order or the amending orders; that many thousands of persons were involved in the iron and steel trade and were affected by these orders; and that, having regard to the bulk of the deposited schedules, it was impracticable for all to acquire the information therein contained.

It was submitted on behalf of the appellants (i) that the orders were of no force, effect, or validity, on the ground that, as the deposited schedules which formed part of the orders had not been printed, and the Minister had failed to issue his certificate pursuant to the Statutory Instruments Regulations, 1947, reg. 7, exempting the schedules from the requirement of being printed, the orders had not been issued or published within the Statutory Instruments Act, 1946; (ii) that the Minister of Supply had not proved that at the date of the purported issue of the orders he had taken reasonable steps to bring them to the notice of the public, or of persons likely to be affected thereby, or of the persons charged; and (iii) that on the evidence admitted or proved no offence was shown to have been committed. It was contended on behalf of the respondent (i) that by virtue of the Price Control and Other Orders (Indemnity) Act, 1951, any invalidity affecting the Iron and Steel Prices Order, 1951, was removed; (ii) that, in any event, the orders were valid even if (which was not admitted) there had been any irregularity regarding the printing thereof; (iii) that each of the orders had been duly issued by Her Majesty's Stationery Office at the dates of the appellants' contraventions thereof; and (iv) that the letters sent by Mrs. Silverston to the editor of statutory instruments were or included certificates for the purpose of the Statutory Instruments Regulations, 1947, reg. 7.

The justices were of the opinion (i) that the Iron and Steel Prices Order, 1951, and the amendments thereof were validly made and of full force and effect in respect of the whole of the period covered by the said informations; (ii) that, if the orders were not valid apart from any irregularity in printing, then (a) by virtue of the Price Control and Other Orders (Indemnity) Act, 1951, the defects, if any, in regard to the orders had been validated, and (b) the letters referred to above were a sufficient compliance with the Statutory Instruments Regulations, 1947, reg. 7, and (iii) that, accordingly, the fact that the deposited schedules were not printed did not invalidate any of these statutory instruments. They convicted all the appellants, who appealed.

*Viscount Hailsham, Q.C., and J. C. G. Burge* for the appellants.

*The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.) and J. P. Ashworth* for the respondent.

**LORD GODDARD, C.J.:** The point we have to decide arises under the Statutory Instruments Act, 1946. The scheme of the Iron and Steel Prices Order, 1951, is to set out in a schedule prices which are said to be "basis prices per ton for the representative-basis-pricing specification". What that means I do not know, but it does not matter. In the body of the order reference



is made to the deposited schedules, and, apparently, the price at which any sort of iron or steel can be sold is to be found in the deposited schedules.

By art. 6 (1):

“ ‘Deposited schedule’ means any one of the ninety-seven deposited price schedules for any class of iron or steel mentioned in the schedule to this order lodged with the Minister of Supply and certified to be a deposited schedule accepted for the purpose of this order by the indorsement ‘Iron and Steel Prices Order, 1951’.”

Then there comes the rest of the indorsement which is to be “signed (with the date of signing) by an under-secretary or a principal assistant secretary in the Ministry of Supply”. The printing of the ninety-seven deposited price schedules would, no doubt, be a very great burden, and would make one of these orders very bulky, and the Statutory Instruments Act, 1946, has dealt with the probability that some orders will contain schedules of such a bulk or length that it would be undesirable to print them.

It is provided by s. 8 (1) of that Act:

“The Treasury may, with the concurrence of the Lord Chancellor and the Speaker of the House of Commons, by statutory instrument make regulations for the purposes of this Act, and such regulations may, in particular:—(a) provide for the different treatment of instruments which are of the nature of a public Act, and of those which are of the nature of a local and personal or private Act . . . (c) provide with respect to any classes or descriptions of statutory instrument that they shall be exempt, either altogether or to such extent as may be determined by or under the regulations, from the requirement of being printed and of being sold by the [Queen’s] printer of Acts of Parliament, or from either of those requirements.”

It is also provided in s. 3 (2):

“In any proceedings against any person for an offence consisting of a contravention of any such statutory instrument, it shall be a defence to prove that the instrument had not been issued by [Her] Majesty’s Stationery Office at the date of the alleged contravention unless it is proved that at that date reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged.”

The regulations which were issued by the Treasury under the Act, namely, the Statutory Instruments Regulations, 1947, provide by reg. 7:

“If the responsible authority considers that the printing and sale in accordance with the requirements of s. 2 (1) of the [Statutory Instruments Act, 1946] of any schedule or other document which is identified by or referred to in a statutory instrument and would, but for the provisions of this regulation, be required to be included in the instrument as so printed and sold, is unnecessary or undesirable having regard to the nature or bulk of the document and to any other steps taken or to be taken for bringing its substance to the notice of the public, he may, on sending it to the [Queen’s] printer of Acts of Parliament, certify accordingly; and any instrument so certified shall, unless the reference committee otherwise direct under these regulations, be exempt from the requirements aforesaid so far as concerns the document specified in the certificate.”

In this case, it is said, among other contentions that have been put forward, that no certificate was given by the responsible authority that the printing of the deposited schedules to this order was unnecessary. The first question which we have to consider, therefore, is: Was a certificate given by the responsible authority dispensing with the printing of these schedules?

The only document that was proved at the trial and relied on as a certificate was a letter in these terms—I suppose it is a common form letter used in the Ministry of Supply to be filled in as the case may require:

“I am directed by the Minister of Supply to inform you that he has made a statutory instrument, of which one copy is annexed hereto, entitled——— and to request you to number it in accordance with reg. 3 of the Statutory Instruments Regulations, 1947, and to be good enough to insert the number: (i) in all the copies of the instrument contained in this folder, and (ii) at (a) of para. 3 of the letter to the Stationery Office below. This instrument has been certified to be a general instrument under reg. 4 of the Statutory Instruments Regulations, 1947, and I am to request you to treat it accordingly. The documents identified in this instrument as deposited schedules have been certified under reg. 7 to be exempted from printing and sale as part of the copies of the instrument; but subject thereto, copies of this instrument are to be printed and sold by the [Queen's] printer of Acts of Parliament. I am to request you to be good enough to complete and sign part I of the receipt sheet contained in this folder.”

That letter is addressed to the editor of statutory instruments at the Stationery Office. It can hardly be contended, and it has only been faintly argued by the Solicitor-General, that that letter is a certificate. It is a letter which says there is a certificate, but the certificate was never produced. The letter clearly is not a certificate. Therefore, we have no difficulty in holding that no certificate under reg. 7 was ever issued.

What is the effect of that? That is a point which it seemed to the court might deserve a very careful argument and very full consideration, but the Solicitor-General has accepted the position that the result is that, if no certificate has been given exempting the Queen's printer from printing the whole of the order, while it does not affect the validity of the order itself, it throws on the Crown the burden of proving that at the date of the commission of the offence reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or the person charged. It is abundantly clear from the Cases Stated that there was no evidence before the justices that the steps required by s. 3 (2) of the Act of 1946 to be proved by the prosecution had been taken, and that, therefore, the appellants were entitled to rely on that as a defence. No evidence was given on that point because, at the hearing, the Crown were relying on the letter (to which I have referred) as a certificate and as exempting them from the necessity of proving these facts. What was before the justices was evidence that an assistant secretary in the Ministry of Supply

“whose duties included the making of arrangements for the printing of statutory instruments made by the Minister, decided, having regard to the provisions of reg. 7 of the Statutory Instruments Regulations, 1947, that the printing and sale of the said deposited schedules referred to in each of the said statutory instruments . . . was unnecessary; that in so deciding she had regard primarily to the bulk of the schedules: secondly to the fact that copies thereof were to be made available through the regional offices; and, thirdly, to the fact (of which she was aware) that

trade associations would be distributing to the trade copies of the said deposited schedules or at least of such parts thereof as related to types of iron and steel most in demand."

No doubt, she thought that those things were to be done, and her anticipation may have been correct. It may be she knew enough to be satisfied that in due course these things would be done, but that does not discharge the burden which the statute places on the Crown in the event, as the Solicitor-General has admitted, that there is no certificate exempting the Queen's printer from printing part of the order. The appellants contended that the Minister of Supply had not proved that at the date when he purported to issue the said statutory instruments he had taken reasonable steps to bring the purport of the said statutory instruments to the notice of the public, and, on the other hand, the Crown never contended that they had given any such evidence. The appellants were entitled to rely on the fact that this evidence had not been given, and, accordingly, the justices ought to have dismissed the informations.

**LYNSKEY, J.:** I agree that this letter does not amount to a certificate, and no certificate, therefore, has been proved to have been given by the responsible authority, the Minister. The result is that, on the Solicitor-General's admission, s. 3 (2) applies and gives a defence to the appellants. They have proved that the order was not printed as, under s. 2 (1) of the Act of 1946, it ought to have been in full by the Stationery Office at the time of these alleged offences. No attempt was made, because of the contentions put forward by the Crown, to prove that

"reasonable steps had been taken for the purpose of bringing the purport of the instrument to the notice of the public, or of persons likely to be affected by it, or of the person charged."

There is no finding by the justices that that had been done, and it would be rather remarkable in view of the contentions put before them if they had ever addressed their minds to that question, having regard to the fact that they accepted the argument of the Crown on the first contention—that s. 3 (2) could not apply because of the certificate of exemption from printing which had been given. The result is that there was no certificate, there should have been printing, no printing had been done at the time of the commission of these offences, and there was no evidence on which the justices could be asked to find that the Crown had discharged the burden imposed under s. 3 (2) of the Act of 1946. The result is that these appeals must be allowed.

**PARKER, J.:** I agree, and would only add this. When counsel for the appellants opened this case, he submitted that the effect of a contravention of the Statutory Instruments Act, 1946, s. 2 (1), in not causing to be printed a statutory instrument which was required to be printed, was that the instrument was wholly invalid. He also contended that the effect of s. 3 (2) of that Act was that in every case, whether a statutory instrument was required to be printed or not, it was a defence to the subject if it had not been proved that reasonable steps had been taken for bringing the purport of the instrument to the notice of the public. Those matters clearly raise very important questions of principle, but, as the case has developed, it has become unnecessary to determine either of them. Once it appears that there has been no valid certificate exempting the deposited schedules from being printed, it is conceded that s. 3 (2) comes into operation. It is clear that no evidence was given—and, accordingly, there was no finding by the justices—that at the date of the

alleged contraventions the reasonable steps required had been carried out. For these reasons I agree that these convictions should be quashed.

*Appeal allowed.*

Solicitors: *Lucien Fior* (for the appellants); *Treasury Solicitor* (for the respondent). T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSEY AND PARKER, JJ.)

Apr. 28, 29, 1953

REG. v. MINISTER OF HOUSING AND LOCAL GOVERNMENT. *Ex parte* CORPORATION OF LONDON

*Town and Country Planning—Purchase notice—Service by trustees—"Owner" of land—Person entitled to receive rackrent—Duty of Minister before confirming—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 19 (1) (2), s. 119 (1).*

In 1873 the owners of certain premises in the city of London granted a lease for eighty years at a rent of £350 per annum, and in 1922 the lessee granted an underlease for the remainder of the term less seven days at a rent of £1,136. In 1925 trustees, who were then the reversioners of the freehold, let the premises to the under-lessees for seventy-five years at a rent of £750, subject to and with the benefit of the original lease of 1873. In 1940 the underlease granted in 1922 was transferred to H. & Sons, who also obtained a land certificate in respect of the lease of 1925, subject to the original lease of 1873, and in 1942 they acquired the residue of that lease. The premises were destroyed by enemy action. In 1950 H. & Sons gave notice to the Corporation of London, the planning authority, asking for permission to develop the site, but this was refused. H. & Sons then served a purchase notice under s. 19 (1) of the Town and Country Planning Act, 1947, on the corporation, requiring the corporation to purchase their leasehold interest. This notice was confirmed by the Minister, and the leasehold interest was transferred to the corporation. In March, 1952, the trustees applied to the corporation for permission to develop the site, and, on this being refused, appealed to the Minister under s. 16 (1) of the Act. The appeal was dismissed, and in September, 1952, the trustees served a purchase notice on the corporation under s. 19 (1), requiring the corporation to purchase the site, and this notice was confirmed by the Minister on Dec. 31, 1952.

HELD: (i) that the meaning to be applied to the word "owner" in s. 19 (1) of the Act was the same as that placed on it by the definition section, s. 119 (1); (ii) that, in view of the rent reserved by the underlease of 1922, the letting of 1925 was not at a rackrent, and under that letting the trustees were, therefore, not entitled to receive a rackrent; moreover, even if the premises were let at a rackrent, they would not be entitled to that rackrent, having parted with possession of the property till 1999; and, accordingly, they were not "owners" within the meaning of s. 19 (1) and were not entitled to serve a purchase notice under that sub-section; and the order of Dec. 31, 1952, must be quashed.

Where the jurisdiction of the Minister to make an order confirming a purchase notice under s. 19 (1) is challenged, he ought to satisfy himself by the necessary inquiries that he has that jurisdiction.

MOTIONS for orders of certiorari and mandamus.

On Sept. 29, 1873, the Commissioners of Sewers of the City of London, as owners of No. 69, Ludgate Hill, in the city of London, leased the premises to T. Treloar for eighty years at a ground rent of £350 per annum. Later, the commissioners transferred their reversion of the freehold of the premises to one Alexander Jones. On May 23, 1922, the representatives of T. Treloar



granted an underlease of the premises to S. T. Williamson and E. B. Williamson for the remainder of the term of eighty years less seven days at a rent of £1,136 per annum, which was approximately the rackrent which would be obtainable at that date. On Oct. 2, 1924, S. T. Williamson and E. B. Williamson assigned their underlease to E. B. Williamson and C. M. Walker. On June 23, 1925, the trustees of Alexander Jones granted a lease of seventy-five years to E. B. Williamson and C. M. Walker at a rent of £750 per annum, subject to, but with the benefit of, the original lease of Sept. 29, 1873. On Feb. 19, 1940, the underlease of May 23, 1922, was transferred to Hampton & Sons, Ltd.; on Mar. 11, 1940, they were granted a land certificate in respect of the lease of June 23, 1925, subject to the original lease of Sept. 29, 1873; and on Apr. 8, 1942, they acquired the residue of the term of the original lease of Sept. 23, 1873. In the early part of 1940 the premises were damaged by enemy action, and in May, 1941, they were completely destroyed and the site was left derelict. On Feb. 9, 1950, Hampton & Sons, Ltd., gave notice to the Corporation of London, as the planning authority, asking for permission to develop the site, but permission was refused on the ground that the land was required for other forms of development. On Aug. 17, 1950, Hampton & Sons, Ltd., served a purchase notice on the corporation under s. 19 (1) of the Act requiring the corporation to purchase their leasehold interest in the site, and the corporation, in accordance with s. 19 (2), sent the notice to the Minister. The corporation took the view that Hampton & Sons, Ltd. were the owners of the site within the Act and that the Minister was bound to confirm the notice because of the existing state of the site, and so they did not oppose the application to the Minister to confirm the notice, which he did on Nov. 9, 1950. The sum agreed to be payable to Hampton & Sons, Ltd. for their leasehold interest was £71,250. That sum was paid to them by the corporation in due course, their leasehold interest was assigned to the corporation, and the title of the corporation to the leasehold interest was registered at the Land Registry.

On Mar. 24, 1952, the trustees of Alexander Jones applied to the corporation for permission to develop the site. The corporation informed them that planning permission for development had already been refused, but they appealed to the Minister under s. 16 (1) of the Act, and, on Aug. 22, 1952, the Minister disallowed the appeal. On Sept. 1, 1952, the trustees served a purchase notice on the corporation requiring the corporation to purchase the fee simple in the site. The corporation sent the notice to the Minister under s. 19 (2), and, in opposition to the application to the Minister to confirm the notice, contended that the trustees, being freeholders of the site in respect of which there was a leasehold interest which was vested in the corporation, were not "owners" under s. 119 (1) of the Act who could serve a purchase notice under s. 19 (1). The trustees contended that the Minister was not concerned with the question of ownership, and that his duties were confined to considering whether the conditions specified in s. 19 (1) (a) and (b) were fulfilled in relation to the land which was the subject of the notice. They submitted, first, that the context was such that the definition of "owner" in s. 119 (1) was not applicable, and, secondly, that, if it was, the rent receivable by the trustees was a rackrent.

On Dec. 31, 1952, the Minister confirmed the notice and stated that he accepted the view put forward by the trustees and that his confirmation did not import any decision whether the servers of the purchase notice were owners entitled to serve such a notice or not. The corporation applied for an order of certiorari to quash the Minister's decision of Dec. 31, 1952, and that an order of mandamus should issue to the Minister requiring him to hear and

determine the issue of the confirmation or otherwise of the purchase notice of Sept. 1, 1952.

*Harold Williams, Q.C.*, and *D. C. Walker-Smith* for the Corporation of London.

*J. P. Ashworth* for the Minister of Housing and Local Government.

*Heathcote-Williams, Q.C.*, and *R. E. Megarry* for the trustees of Alexander Jones' estate.

**LORD GODDARD, C.J.:** I will ask *LYNSKEY, J.*, to give the first judgment.

**LYNSKEY, J.:** This is a motion by the Corporation of London for an order of certiorari for the removal into this court

"of a decision dated Dec. 31, 1952, made by the Minister of Housing and Local Government pursuant to the Town and Country Planning Act, 1947, confirming or purporting to confirm a purchase notice served or purported to be served under s. 19 of the said Act in respect of the fee simple of land being the site of No. 69, Ludgate Hill, in the city of London",

the notice being given by or on behalf of Sir William Robert Dermot Joshua Cusack-Smith, Baronet, and Elizabeth Dora Allworth, widow, the trustees of the real estate of Alexander Jones, deceased. The Minister's order was made under s. 19 (1) of the Town and Country Planning Act, 1947, which provides:

"Where permission to develop any land is refused, whether by the local planning authority or by the Minister, on an application in that behalf made under this Part of this Act, or is granted by that authority or by the Minister subject to conditions, then if any owner of the land claims—(a) that the land has become incapable of reasonably beneficial use in its existing state; and (b) in a case where permission to develop the land was granted as aforesaid subject to conditions, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of the permitted development in accordance with those conditions; (c) in any case, that the land cannot be rendered capable of reasonably beneficial use by the carrying out of any other development for which permission has been or is deemed to be granted under this Part of this Act, or for which the local planning authority or the Minister have undertaken to grant such permission, he may, within the time and in the manner prescribed by regulations made under this Act, serve on the council of the county borough or county district in which the land is situated a notice (hereinafter referred to as a 'purchase notice') requiring that council to purchase his interest in the land in accordance with the provisions of this section."

By sub-s. (2):

"Where a purchase notice is served on any council under this section, that council shall forthwith transmit a copy of the notice to the Minister, and subject to the following provisions of this section the Minister shall, if he is satisfied that the conditions specified in paras. (a) to (c) of the foregoing sub-section are fulfilled, confirm the notice, and thereupon the council shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served a notice to treat in respect thereof on such date as the Minister may direct . . ."

By sub-s. (3):

"If within the period of six months from the date on which a purchase

notice is served under this section the Minister has neither confirmed the notice nor taken any such other action as is mentioned in para. (a) or para. (b) of the last foregoing sub-section, nor notified the owner by whom the notice was served that he does not propose to confirm the notice, the notice shall be deemed to be confirmed at the expiration of that period, and the council on whom the notice was served shall be deemed to be authorised to acquire the interest of the owner compulsorily in accordance with the provisions of Part IV of this Act, and to have served notice to treat in respect thereof at the expiration of the said period."

By s. 119 (1) the definition of "owner", "except so far as the contrary is provided or the context otherwise requires", is:

"'owner', in relation to any land, means, except in Part VI of this Act, a person, other than a mortgagee not in possession, who, whether in his own right or as trustee or agent for any other person, is entitled to receive the rackrent of the land or, where the land is not let at a rackrent, would be so entitled if it were so let, and, in Part VI of this Act, has the meaning assigned to it by s. 64 of this Act."

Those were the sections under which the Minister purported to act in confirming the notice, and the point taken by the corporation in their motion is that the Minister had no jurisdiction to make his order confirming the notice because the person or persons who had given the notice which he purported to confirm were not owners of the land as defined in the Act and not owners within the meaning of s. 19 (1)—in other words, the trustees of the late Alexander Jones were not persons entitled to give that notice. The result is that the notice given by them was a nullity, and the Minister was, therefore, without jurisdiction to deal with the matter.

[HIS LORDSHIP stated the facts and continued:] It was contended on behalf of the trustees that the definition of "owner" in s. 119 (1) was not to be applied to the word "owner" when used in s. 19 (1). It was said that the context of s. 19 (1) otherwise required, and, in particular, that the use of the word "any" before the word "owner"—"if any owner of the land claims"—indicated that the context required a different interpretation of the word "owner" from that given in s. 119 (1). I do not think that one can say that the context of s. 19 (1) does require any different interpretation of the word "owner" from that which is given in s. 119 (1). In fact, when one looks at the later provisions of the Act (s. 26 and s. 27), it seems fairly clear that the Act is distinguishing between an owner and other persons having other interests, and the effect of s. 119 (1) is to make it clear who is the owner of the land for the purposes of applying the provisions of s. 19, apart from other sections of the Act.

The question then arises whether the trustees can be described as being "owners" having regard to the definition of "owner" in s. 119 (1). The first point to consider is: Was this land at the time let at a rackrent? Two possibilities have been envisaged. First, it is suggested that the lease of 1925 was a letting at a rackrent, and, as the premises are still let under that lease, the trustees are persons entitled under the terms of that lease to receive the rackrent. When, however, one looks at the position in 1922 when these premises were let at £1,136 per annum to an occupying tenant, it is impossible to say that a rental in 1925 of £750 a year was anything more than a type of ground rent, and, in fact, although the argument was suggested by counsel for the trustees, I do not think it was stressed with any great vigour. On the other

hand, it is said that the trustees would be entitled to the rackrent if the premises were so let—that at present these are derelict premises, and, but for the provisions of the Landlord and Tenant (War Damage) Act, 1939, the trustees would be entitled to £750 per annum, and, this being a derelict site, that would be a rackrent. That pre-supposes the fact that they are in a position to let and to receive rent if let. Their position today is that they are not entitled either to enter on the land themselves or to allow anybody else to do so. They have parted with their possession of the land until 1999. They have no power to let. They have no power to collect rent in respect of the premises and, therefore, it cannot be said that they are persons who, if the land is let at a rackrent, would be so entitled. The persons so entitled if the premises were let at a rackrent would be the Corporation of London as the persons entitled to occupy under the lease of 1925 which had been assigned to them.

The result is that it is clear that the trustees are not “owners” as defined in s. 119 (1) of the Act, and, therefore, were not persons who were entitled to serve the purchase notice under s. 19 (1). Therefore, that notice was a nullity, the Minister had no jurisdiction to make an order confirming it, and his order doing so must be brought up and quashed.

It is submitted on behalf of the corporation as one of their grounds for asking this court to quash the confirmation that the Minister refused to inquire whether the persons serving the notice were owners or not. It seems to me that if the jurisdiction of the Minister to make the order is challenged, as it was challenged in this case, it falls on him to satisfy himself that he has jurisdiction to deal with the matter, and to that extent he must make the necessary inquiries to satisfy himself that he has power to exercise the jurisdiction which he is actually exercising at the time. Whether he ought to inquire in every case is another matter, and I do not propose to lay down any general rule about this but only to deal with the facts I have before me. All I say is that, if the jurisdiction of the Minister is challenged as to his right to make the order, he ought to satisfy himself that he has that jurisdiction. If he does satisfy himself that he has, of course, he can exercise it. If he is satisfied that he has not, he can refuse to exercise it. It may leave the person who has received the refusal in a difficult position, but that is not a matter with which we are directly concerned.

**LORD GODDARD, C.J.:** I agree.

**PARKER, J.:** I agree.

*Order of certiorari.*

Solicitors: *Comptroller and City Solicitor* (for the Corporation of London); *Solicitor of the Ministry of Health and Solicitor of the Ministry of Housing and Local Government* (for the Minister of Housing and Local Government); *Bozall & Bozall* (for the trustees of Alexander Jones' estate).

T.R.F.B.



COURT OF APPEAL

(DENNING AND HODSON, L.JJ.)

April 29, 1953

CRABTREE v. CRABTREE

*Divorce—Desertion—Termination—Agreement to pay maintenance—“If [the spouses] shall so long live separate and apart from each other.”*

A husband who had deserted his wife entered into an agreement with her under which he undertook “during the joint lives of himself and the wife, if they shall so long live separate and apart from each other” to pay weekly sums for the maintenance of herself and of the child of the marriage. The sums were to cease to be payable if the parties came together again or if the marriage was dissolved.

HELD: the agreement merely defined the duration of the payments of maintenance and did not bind the parties to live separate and apart, and it did not, therefore, prevent the husband's desertion from running.

Dictum of SIR WILFRID GREENE, M.R., in *Lord Long of Wraxall v. Lady Long of Wraxall* ([1940] 4 All E.R. 233), applied.

APPEAL by the wife from a decision of Mr. Commissioner REWCASTLE on Nov. 24, 1952, whereby he dismissed the wife's petition for divorce on the ground of the husband's desertion, holding that that desertion had ceased to run by reason of an agreement made between the parties which amounted to a separation agreement.

*L. A. Pratt* for the wife.

*Petrie* for the husband.

DENNING, L.J.: The parties married on Sept. 23, 1944, and there is one child, a girl born on June 17, 1945. In 1947 the husband left the home, and when the wife's mother went to try to get him back, he refused with some emphasis to return. In these circumstances he was clearly guilty of desertion, but the question is whether his desertion came to an end by reason of the terms of an agreement made on Jan. 3, 1948. The material clause of that agreement is cl. 1 which was as follows:

“The husband and the wife having for some time past lived separate and apart from each other and the wife having the custody of and control of the said child of the marriage, the husband agrees with the wife that he will during the joint lives of himself and the wife, if they shall so long live separate and apart from each other, pay to her for the support and maintenance of herself the weekly sum of £1 and for the maintenance of the said child the weekly sum of £1 until the said child attains the age of sixteen years.”

The wife agreed to maintain herself with the help of that allowance, and there was a clause whereby, if at any time the parties came together again or if the marriage were dissolved, the sum should cease to be payable.

The question is whether, as a result of that agreement, the desertion ceased to run. That is a question of interpretation. If it was an agreement binding the parties to live separate and apart it would stop the desertion running, but if it was only an agreement to pay maintenance it would not. In *Lord Long of Wraxall v. Lady Long of Wraxall* (1) it was held that an agreement to live separate and apart had brought the desertion to an end. SIR WILFRID GREENE, M.R., said ([1940] 4 All E.R. 233):

“It appeared from the evidence of the appellant that the real purpose

(1) [1940] 4 All E.R. 230.

of the separation deed was, in the minds of both parties, to regulate the financial position and to make provision with regard to the child. If the deed had been confined to these matters, no difficulty would have arisen."

SIR WILFRID GREENE there recognises that on or after separation the parties can regulate the financial position between them without bringing the desertion to an end. On its true interpretation, I think that the present agreement was such an agreement as SIR WILFRID GREENE had in mind. It is confined to maintenance. The words "if they shall so long live separate and apart" simply define the duration of the payment and do not amount to a bargain binding them to live separate and apart. The agreement does not stop the desertion from running. The petition should be granted and a decree nisi pronounced on the ground of the husband's desertion.

HODSON, L.J.: I agree. The desertion began to run in November, 1947, and the only question which arises on this appeal is whether it was terminated on the execution of an agreement dated Jan. 3, 1948, which was entered into between the parties. The learned commissioner thought that, on its true construction, this agreement was a separation agreement, and, accordingly, that desertion ceased to run from the moment when the parties put their hands to it. I think the position is correctly set out in *RAYDEN ON DIVORCE*, 5th ed., p. 113, in this way:

"A deed which contains no express or implied stipulation that the petitioner agrees to the respondent living apart will not prevent desertion from running."

That there may be deeds of a kind which will not prevent desertion from running is plain from the passage from the judgment in *Lord Long of Wraxall v. Lady Long of Wraxall* (1) which my Lord has read. The words which were thought to stand in the way of the petitioning wife here are those which follow the agreement by the husband to pay—"if they shall so long live separate and apart". If those words imply a stipulation that the wife agrees to the husband living apart from her, they prevent desertion from running, but otherwise they do not. In my judgment, on their true construction these words are merely a conditional clause defining the duration of the payment and do not imply such a stipulation, and they come within the exception which appears to have been contemplated by SIR WILFRID GREENE, M.R., in *Lord Long of Wraxall v. Lady Long of Wraxall* (1). I agree, therefore, that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Wood, Nash & Co.*, agents for *Wilkinson, Woodward & Ludlam*, Halifax (for the wife); *Williamson, Hill & Co.*, agents for *Clarkson, Thomas & Hanson*, Halifax (for the husband).

G.F.L.B.

(1) [1940] 4 All E.R. 230.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., LYNSKEY AND PARKER, JJ.)

Apr. 29, 30, May 11, 1953

WURZAL v. DOWKER

*Road Traffic—Express carriage—Use without road service licence—"Special occasion"—Members of club conveyed on fishing trips—Journeys on seven consecutive Sundays—Road Traffic Act, 1930 (20 and 21 Vict., c. 43), s. 61 (2), s. 72 (1)—Road Traffic Act, 1934 (24 and 25 Vict., c. 50), s. 25 (1).*

Justices dismissed informations against the respondent, who was charged with unlawfully permitting a motor coach to be used as an express carriage without the requisite road service licence, contrary to s. 72 (1) of the Road Traffic Act, 1930. The respondent hired a coach in respect of the use of which he did not hold such a licence to a working men's club to take members of the club on fishing trips on seven consecutive Sundays. All the conditions specified in s. 25 (1) of the Road Traffic Act, 1934, were satisfied, and the justices were of opinion that the occasions of the trips were "special occasions" within the meaning of the proviso to s. 61 (2) of the Act of 1930.

**HELD:** that, to be a "special occasion" within the meaning of the proviso, an occasion must be special in the locality to which the journey was made or to the public thereof, and the fact that it was special from the point of view of the members of the party was not sufficient. The conditions in s. 25 (1) of the Act of 1934 were not definitive of what was a "special occasion", but were additional conditions which had to be complied with on what would amount to a special occasion apart from them. The justices were, therefore, wrong in holding that the occasions in question were special, and the case must be remitted to them with a direction to convict.

*Per curiam:* On any view of the meaning of "special occasion", the frequency of the journeys would have probably prevented the occasions in question from being special.

*Miller v. Pill. Pill v. Furse. Pill v. Mutton (J.) & Son* (1933) (97 J.P. 197), applied.

Dicta of LORD GODDARD, C.J., in *Victoria Motors (Scarborough), Ltd. v. Wurzal* (1951) (115 J.P. 333), not followed.

## CASE STATED by Sheffield justices.

At a court of summary jurisdiction sitting at Sheffield the appellant, Ernest Wurzal, on behalf of the licensing authority for public service vehicles for the Yorkshire traffic area, preferred seven informations against the respondent, Jethro Dowker, charging that on Sunday, Aug. 17, 1952, and on the six following Sundays, he did unlawfully permit a vehicle (registration number KOG 447 and on one occasion KPJ 249) to be used as an express carriage within the meaning of the Road Traffic Acts, 1930 to 1937, in Kelvin road and other roads in the city of Sheffield otherwise than under a road service licence granted by the licensing authority, contrary to the Road Traffic Act, 1930, s. 72.

It was proved or admitted that the respondent was the proprietor of a business known as Ideal Coaches and was the registered owner of two motor coaches numbered KOG 447 and KPJ 249. On the first six material dates the motor coach KOG 447 and on the seventh date the motor coach KPJ 249 were hired from the respondent by a member of the committee of the Philadelphian Working Men's Club to take members of the club on fishing trips to Boston, the Boston area, and Tattershall. The respondent had no licence to use the vehicles as express carriages on the material dates. It was agreed that all the conditions specified in the Road Traffic Act, 1934, s. 25 (1) (which deals with the conditions which must be fulfilled before a vehicle can be exempted from obtaining a licence when used on a "special occasion"), had been satisfied, and that the only issue to be tried was whether these occasions were "special occasions"

within the meaning of the Road Traffic Act, 1930, s. 61 (2). The justices dismissed the informations and the appellant appealed.

*J. P. Ashworth* for the appellant.

*Comyn* for the respondent.

*Cur. adv. vult.*

May 11. The following judgments were read.

**PARKER, J.:** This is an appeal by way of Case stated by justices for the city of Sheffield who dismissed seven informations preferred by the appellant on behalf of the licensing authority for public service vehicles for the Yorkshire traffic area against the respondent for that he on certain days permitted the use of two vehicles in contravention of s. 72 of the Road Traffic Act, 1930, in that on each occasion he did unlawfully permit the vehicle to be used as an express carriage.

The facts found by the justices were that the respondent was the proprietor of a business known as Ideal Coaches and the registered owner of the two motor coaches in question; that on each of six Sundays in August and September, 1952, the respondent hired one or other of the motor coaches to a committee member of the Philadelphian Working Men's Club to take members of the club on fishing trips to Boston or the Boston area, and in one case to Tattershall, and that on the dates in question the respondent had no licence to use a vehicle as an express carriage. It was common ground that the user of the vehicle on each of the said dates without a licence was a contravention of s. 72 of the Road Traffic Act, 1930, unless the user thereof came within the proviso to s. 61 (2) of that Act. That sub-section reads as follows:

"It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not. Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

It was also common ground that on each of the said days the conditions specified in s. 25 (1) of the Road Traffic Act, 1934, had been satisfied, and that the party on each day was a private party. Accordingly, the sole question for the justices was whether on the facts found the vehicle being used on any Sunday was being used on a "special occasion", and in this connection it appears that the justices were invited to deal with the matter on the basis that, if the user of the vehicle on the first Sunday was a user on a special occasion, the user on each of the other Sundays was also a user on a special occasion.

In dismissing the information the justices said:

"We were of opinion that these journeys were made in the nature of outings and were not of a general nature, but remained special, both by reason of the distance travelled, the purpose of the outings, and the place of the outings."

On behalf of the appellant it was contended that before it can be said that a vehicle is being used on a special occasion there must be some evidence that the journey is being undertaken to partake in what is a special occasion in the locality to which the journey is made, and that it is not enough that the



journey itself is a special occasion from the point of view of the members of the party. In other words, it is said that, if there had been an annual angling match at Boston on the first Sunday concerned, the vehicle would have been used on a special occasion, but that, as there was no special event in progress, the use of the vehicle could not be a use on a special occasion, even if it was the party's annual outing.

Surprising as this may sound, and whatever views I might otherwise be inclined to hold, apart from authority, I consider that we are bound by the decision of this court in *Miller v. Pill*, *Pill v. Furse*, *Pill v. J. Mutton & Son* (1). In that case the owner of a motor omnibus hired the vehicle to one Rowe to take a party from Launceston to Looe. It was an annual event, Rowe having on each of the last four years arranged a similar trip to Looe. There was nothing at Looe which could be said to be a special occasion there. In his argument for the respondent the Solicitor-General posed the question in this way:

"... the important question in the case is whether 'special occasion' means, as the appellant contends, an occasion special to the private party, such as a day at the seaside, or whether, as the police contend, it has a more restricted meaning confined to an occasion special to the whole locality or to the public."

He went on to contend that "special occasion" in s. 61 (2) should be given the same meaning as in s. 61 (1) where it is clear that the words have the latter meaning. LORD HEWART, C.J. said:

"In my opinion, although the matter is by no means free from doubt there is great force in that argument. I think that it would be wrong and misleading if the term 'special occasion' were used in two different senses in the space of a few lines in the same section of the same Act of Parliament. The justices found as a fact that the occasion was not a special occasion and, although there may be much to be said to the opposite effect, I have come to the conclusion that the argument for the appellant is unsuccessful and that this appeal must be dismissed."

AVORY, J., after expressing considerable doubt, said:

"My inclination at one time was to think that the words 'special occasion' in sub-s. (2) might have a different and more extended meaning than when they are used in sub-s. (1), and that the occasion under consideration should be regarded quoad the purpose of the private party to ascertain whether it was a 'special occasion' within the proviso to the sub-section. I am not, however, prepared to differ from the view that prima facie the words ought to be read in the same sense in the two sub-sections. I am satisfied to decide this case on the ground that there is no sufficient reason for differing from the finding of fact by the justices that the occasion was not a 'special occasion'."

HUMPHREYS, J., said:

"On the point whether the occasion was a 'special occasion' within the proviso to s. 61 (2), if I were dealing with that proviso alone, I should come to the conclusion that the expression 'special occasion' refers to something more than the views and intentions of the members of the party and points to something which can be described as a special occasion in the locality and was the object of the journey being undertaken. And when I turn to the proviso to sub-s. (1) of the same section and find there the same expression as part of the phrase 'on occasions of race meetings,

(1) 97 J.P. 197; [1933] 2 K.B. 308, 312, 315, 316, 318.

public gatherings and other like special occasions', it appears to me to be a strong indication that the view which I have expressed is right, because I think that the words in sub-s. (2) should be accorded the same meaning as those in sub-s. (1), from which they are separated by only a few lines of print. Accordingly, I agree that a 'special occasion' within the meaning of sub-s. (2) must be a special occasion occurring at the place which is the object of the excursion, or, in other words, something of the same nature as the kind of occasion referred to in the proviso to sub-s. (1), and that it is not enough that it should merely be a special occasion from the point of view of the persons forming the private party. I agree that the matter is by no means free from difficulty, but in the result I agree with the other members of the court."

It is to be observed that, unless the words in question had the restricted meaning contended for by the Solicitor-General, the court could not have upheld the conviction. Accordingly, I think that the decision in that case is binding on this court.

It was, however, urged on the part of the respondent that s. 25 of the Road Traffic Act, 1934, which imposed conditions which have to be complied with before it can be said that the vehicle is used on a "special occasion" has in some way altered the position. Those conditions, however, as was held in *Victoria Motors (Scarborough), Ltd. v. Wurzel* (1), are not definitive of what is a special occasion, but are merely additional conditions to what, apart from them, would amount to a special occasion. Reading both the Acts together, as we are bound to do, I cannot see anything in s. 25 of the Act of 1934 which is so plainly inconsistent with the accepted construction of s. 61 (2) of the Act of 1930 as to necessitate one to hold that the latter sub-section has been impliedly amended. Indeed, when s. 25 (1) of the Act of 1934 was passed Parliament must be taken to have had in mind the principle enunciated in *Miller v. Pill* (2), and, if it had been desired to amend s. 61 (2) of the Act of 1930, plain words to that effect would surely have been used. Applying to the facts of this case the principle above referred to, it is plain that on no Sunday was the vehicle in question used on a special occasion.

I should add that it is, in my view, unfortunate that the justices were persuaded to deal with the matter on the basis of the concession made by the prosecution, and referred to above, namely, that, if the use of the vehicle on the first Sunday was use on a special occasion, the use on each of the other Sundays was also on a special occasion. Apart from this concession the frequency of the journeys would probably on any view of the meaning of "special occasion" have forced the justices and this court to hold that the offences had been proved. In the result, in my view, the Case should go back to the justices with a direction to convict. Sentence is, of course, a matter for them, but in the circumstances of this case they may well think that a nominal fine is appropriate.

I am to add that **LYNSKEY, J.**, agrees with this judgment.

**LORD GODDARD, C.J.:** I agree that this court is bound by the previous decision in *Miller v. Pill* (2), and, consequently, this appeal must succeed. That case was not brought to the attention of the court when *Victoria Motors (Scarborough), Ltd. v. Wurzel* (1) was before us and would not have affected the decision if it had been. But I regret that in dealing there with what could

(1) 115 J.P. 333; [1951] 1 All E.R. 1016; [1951] 2 K.B. 520.

(2) 97 J.P. 197; [1933] 2 K.B. 308, 312, 315, 316, 318.

amount to a special occasion I gave illustrations some of which I now see could not be so regarded in view of the decision in *Miller v. Pill* (1). It seems that a day's excursion, a Sunday school or mothers' union party, cannot be treated as a special occasion so long as that decision stands, and we cannot overrule it. It is only right that I should take responsibility for having misled the justices by the illustrations I gave per incuriam. But I may, I hope, be permitted to say with all respect that I feel great doubt about the decision in *Miller v. Pill* (1), and it is apparent that AVORY, J., who was a member of the court, also did, though he did not dissent. As we are bound by the decision, it is, perhaps, unprofitable to discuss it, but I desire to state quite briefly why I thought such occasions as I illustrated could be regarded as special in relation to the use of a motor vehicle by a private party. I agree that when the same words are used twice in a statute, prima facie they should be given the same construction, but the context may require a different interpretation.

The first proviso is not dealing with motor vehicles used by private parties, but with taxi-cabs or private hire cars in effect plying for hire and picking up casual travellers, thus competing with omnibuses. This is permitted only in connection with race meetings, public gatherings, and other like special occasions. To use a homely illustration, it provides for cabs at stations picking up passengers who may be travelling quite independently of one another and taking them at so much a head to a neighbouring race course or gathering. The second proviso deals with a private party who hire a motor coach for a special occasion, and the stringent provisions of s. 25 of the Act of 1934 must be satisfied before the party can be regarded as private. If it was intended to limit the use of the vehicle to journeys for attending such things as race meetings or public gatherings, I should have expected the proviso to make this clear by a reference to the previous proviso where, it will be observed, the word "like" appears, though it does not in the latter. From a common-sense angle I think most people would say that a village school treat was a special occasion, certainly in the lives of those attending it. The result of *Miller v. Pill* (1), however, seems to be that, if a treat were planned to a neighbouring seaside town and was fixed for a day on which a statue or a drinking fountain was to be unveiled as a memorial to a deceased mayor or member of Parliament, providing the children were obliged as part of their outing to attend this dismal festivity, the treat would be a special occasion, but otherwise it would not. The justices, therefore, came to a wrong decision on this matter, but it is I and the other members of the court who heard the *Victoria Motors* case (2) who ought to take the blame, if any.

On another matter the justices were, in my opinion, also misled, this time by the prosecutor. The concession he made to which PARKER, J., has referred was, I think, incorrect, and should not have been made. The journeys to which the information related seem to have formed part of the ordinary programme of the fishing season, and though, but for *Miller v. Pill* (1), the first trip might have been regarded as a special occasion, I cannot see how seven consecutive Sunday outings could be. They were habitual and not special. I agree that the appeal must be allowed and cordially indorse the concluding sentence of the judgment of PARKER, J.

*Appeal allowed.*

Solicitors: *Treasury Solicitor* (for the appellant); *Hosking & Berkeley*, agents for *A. B. Thorneloe*, Sheffield (for the respondent). T.R.F.B.

(1) 97 J.P. 197; [1933] 2 K.B. 308, 312, 315, 316, 318.

(2) 115 J.P. 333; [1951] 1 All E.R. 1016; [1951] 2 K.B. 520.

## CARDIFF ASSIZES

(DEVLIN, J.)

March 23 and 24, 1953

REG. v. ROBERTS

*Criminal Law—Trial—Issue of fitness to plead—Request by defence for general issue to be tried first.*

On being arraigned on an indictment the prisoner stood mute and was found by a jury to be mute by the visitation of God. The Crown then submitted that the issue of the fitness of the prisoner to plead should be tried forthwith, but counsel for the defence asked that the trial on this issue should be postponed until the general issue had been tried, indicating that he had a defence on the facts.

HELD: that it was open to the court to follow the procedure requested by the defence, and that it was proper to do so in the circumstances of the case.

TRIAL on an indictment for murder.

The defendant, on being arraigned, stood mute, and a jury was impanelled to try the issue whether he was mute by malice or by the visitation of God. Evidence, which was not contradicted, was called by the defence to show that he had been deaf and dumb from birth, and the jury found that he was mute by the visitation of God. Counsel for the Crown submitted that the evidence so far called raised a presumption of idiotism; that, *prima facie*, the defendant was unfit to plead, and incapable of following the proceedings, of instructing counsel for the defence, or of challenging a juror; and that on the authorities these matters (on which the Crown had further evidence to call) should be next tried. It was common ground that, if the defendant were found unfit to plead, the learned judge must order his detention as a Broadmoor patient till Her Majesty's pleasure should be known. Counsel for the defence submitted that no presumption of idiotism arose, and that there was no precedent for trying the issue whether or not the defendant was fit to plead before the general issue on the application of the Crown, although such a course had been taken on an application by the defence. In reply to DEVLIN, J., he intimated that there was a defence on the facts, and that he desired that the jury should try the defendant on the general issue.

*Lloyd-Jones, Q.C., and J. J. Roberts for the Crown.*

*H. Edmund Davies, Q.C., S. J. H. Evans and Hywel ap Robert for the defendant.*

DEVLIN, J.: In this case the defendant has been found to be mute by the visitation of God on the verdict of a jury, and principle and authority direct that, unless there is some reason for taking some other course, that finding should be the basis of entering a plea of Not Guilty on behalf of the defendant and the trial against him must proceed. But whether the defendant is found mute of malice or mute by the visitation of God, a question often arises at the beginning of a trial whether he is fit to plead, and it has been laid down clearly by the authorities that, if it be established that a man's mind is such that he would be incapable of understanding the nature of the proceedings, it would not be right that he should be put on his trial and convicted of the offence. Such a conviction could not stand. It is clear from the authorities that it is not merely defects of the mind which may bring about that result. Defects of the senses, whether or not combined with some defect of the mind, may do so, and the authorities are clear that, if there are no certain means of communication with the defendant so that there are no



certain means of making sure that he will follow as much as it is necessary that he should follow of the proceedings at his trial, he should then be found unfit to plead.

In this case, the defendant being mute by the visitation of God, counsel on both sides are agreed, broadly speaking, that there are no certain means of communicating with him the procedure which takes place at this trial, and the question which has arisen is whether that is a matter which has to be determined by the jury in this case, as it is in most cases, at once, the jury being specially sworn for that purpose, or whether, in effect, it can be tried and determined by the jury together with the trial and determination of the general issue whether the defendant be Guilty or Not Guilty. Counsel for the defence wishes the general issue to be tried. He has not disclosed, as, of course, he is not bound to disclose, and, indeed, should not have disclosed, what the nature of his defence is. It may well be that the defence is that the prosecution witnesses do not make out a *prima facie* case, or it may be that the defence has other witnesses, not yet called, who, if believed, would destroy the case which the prosecution would otherwise have made out. Whatever it may be, it is a perfectly conceivable situation, though it never appears to have arisen in practice before, that counsel for the defence, although he cannot be instructed by the defendant, may say: "I do not think the prosecution can make any case against the defendant. If it can, then, of course, I am in no position to defend it with his aid because he cannot instruct me and cannot tell his story. But, as the prosecution can make out no case, I am not prepared to let the matter go merely on the issue whether he is fit or unfit to plead". If that issue is tried, and is tried alone, and a verdict is returned by the jury that the defendant is unfit to plead, the court has no power except to make one order, viz., that he should be detained as a criminal lunatic, or Broadmoor patient as it is now called, until Her Majesty's pleasure be made known, which means, of course, for an indefinite period.

Counsel for the defence cannot be forced to accept that course for his client if, on a true view of the facts, he thinks that he can obtain for his client properly a verdict of Not Guilty. Nor can he be forced to elect. He must be entitled to retain his right to say that the defendant is not in a position to give him instructions and, therefore, he cannot put the defendant in the witness box to tell his own story. He cannot be forced to say to himself: "Shall I play for safety and obtain a verdict whereby the defendant is detained as a criminal lunatic, or shall I, in effect, gamble on the chance of my being able to get him off altogether, with the knowledge that if my gamble fails he will be convicted of murder and there is only one sentence which the court can pass". Though, therefore, it does not appear to be a position which has ever arisen before, and counsel have told me that they have found no authority on the matter, it seems to me that there must be a procedure which would enable counsel for the defence to have the advantage of taking both points. There cannot be any doctrine in a criminal case which compels counsel to elect, and, if there was no such procedure, I think that it would be necessary to invent one, because to insist on the issue being tried of fitness to plead or not might result in the grave injustice of detaining as a criminal lunatic a man who was innocent, and, indeed, it might result in the public mischief that a person so detained would be assumed, in the eyes of the police and of the authorities, to have been the person responsible for the crime—whether he was or was not—and investigations which might have led to the apprehension of the true criminal would not take place.

So far from there being any authority which would compel me to require that procedure to be adopted—and it is only if there was clear authority to compel me to do it that I should be inclined to take that course—I think the authorities indicate that there is a procedure which can properly be followed in a case of this type. The earlier authorities all deal with the principles on which a jury should be charged. I have not investigated them, but counsel for the defence told me, without contradiction, I think, that in each of the earlier authorities the points had been taken by the defence, and, of course, it may very well be, and most frequently will be, that the defence were in the position of having no answer to a *prima facie* case and no ground to urge why the law should not take its course, except the ground that the defendant would be incapable of understanding the proceedings at the trial and incapable, therefore, of putting up any defence. But in *Reg. v. Berry* (1), which came before the Court for Crown Cases Reserved in 1876, a different course was followed. Whether it was followed designedly or not, or whether it was followed because it was thought desirable that there should be some inquiry into the general issue, I do not know. But it is plain from the case that, although a question arose whether or not the prisoner was fit to plead, that question was not submitted to the jury until the prosecution had proved their case, when it was submitted to them, they being asked for a special verdict in conjunction with the general issue. That case was also one where the jury had been sworn to ascertain whether the prisoner stood mute of malice or by the visitation of God, and they found that the prisoner was mute by the visitation of God. The trial proceeded because it was thought that a brother-in-law of the prisoner might be able to communicate with him by means of signs. The learned chairman of the quarter sessions then put two questions to the jury: (i) whether they found the prisoner Guilty or Not Guilty on the indictment, and (ii) whether, in their opinion, the prisoner was capable of understanding, and had understood, the nature of the proceedings. The verdict of the jury was:

“We find the prisoner Guilty on the evidence; and we also find that he is not capable of understanding, and, as a fact, has not understood the nature of the proceedings.”

A Case was stated, and the Court for Crown Cases Reserved found on that evidence that the prisoner could not be convicted, although the jury had found him Guilty, since they had also found that he was not capable of understanding and had not understood the nature of the proceedings. On that verdict the court held that the proper course was that he should be detained under the Criminal Lunatics Act, 1800, s. 2, as the finding of the jury amounted in point of law to a finding of insanity.

I think that *Reg. v. Berry* (1) is the first reported case in which the two issues, the general issue and the issue of fitness to plead, were put before a jury together, and it is significant that there is nothing to be found in the judgments in *Berry's* case (1) which expresses or implies the slightest criticism of that procedure. In the course of the argument KELLY, C.B., said:

“But here the jury have found also that the prisoner was incapable of understanding what passed at the trial, and can it be contended that he might, under such circumstances, be convicted? The question which ought to have been put to the jury in *Rex v. Steel* (2) was properly put in the present one.”

(1) (1876), 1 Q.B.D. 447, 449, 451.

(2) (1787), 1 Leach 451.

Although KELLY, C.B., was not dealing in terms with the time when the question was put, it would be a curious observation to make if his view was that, although the question was properly put, the procedure by which it had been put was entirely wrong and the issue ought to have been tried earlier and separately. The court treated the verdict of the jury so returned as a faulty verdict because, on the question being raised whether there was any authority for detaining the accused as an insane person, KELLY, C.B., relied on the finding of the jury as justifying that course, since, he said, it amounted in point of law to a finding of insanity.

*Reg. v. Berry* (1) and all the earlier cases of any importance were considered by a Divisional Court in *Rex v. Stafford Prison (Governor). Exp. Emery* (2). In that case an accused person, who had been found by a jury to be unfit to plead, was detained under the Criminal Lunatics Act, 1800, s. 2, and the validity of his detention was challenged by a writ of habeas corpus, the question which the court had to determine being whether deafness and inability to read and write and, therefore, to be communicated with, was equivalent, for the purposes of the wording of the Act, to a finding of insanity, and they held that it was. LORD ALVERSTONE, C.J., reviewed the earlier authorities, viz., *Rex v. Steel* (3), *Rex v. Pritchard* (4) before ALDERSON, B., and *Rex v. Dyson* (5) before PARKE, J., in all of which cases the issue had been put to the jury without the general issue being gone into. He then referred to *Reg. v. Berry* (1), and recited the facts of that case, again without any criticism of the procedure which had been followed. At the end of his judgment he followed the earlier decisions in these terms :

"That [*Reg. v. Berry* (1)] is a decision which approved of and adopted the view of the law taken by PARKE, J., and ALDERSON, B., years before; and, following and adopting those decisions, I think that CHANNELL, J., in the present case laid down the right test of insanity for the purpose of the Act of 1800 and rightly made an order for the prisoner's detention during His Majesty's pleasure."

That shows that LORD ALVERSTONE, C.J., took the view that all these authorities were laying down one doctrine, the difference between them, viz., the time when the verdict was taken, being only, I think, a difference of procedure.

In cases where the defence is not going to challenge that the prosecution has a *prima facie* case, and has no evidence which might induce a jury to reject the evidence for the prosecution, then the convenient course is to let the issue be tried at once. I can find no authority in the cases cited which would prevent counsel for the defence, who wishes to test the prosecution's case on the general issue, from having the right to do so, at the same time preserving all those rights which flow to the defence from the fact that the defendant is a person, if it be so established, who is incapable of being communicated with or from instructing counsel for his defence. Were it otherwise, I think that the gravest mischief and injustice might follow. The defence might wish to tender a witness who, if he was believed, could prove that the defendant was ten miles away at the time of the alleged crime. It cannot, I think, be our law that, by some formality of procedure, counsel for the defendant should be prevented from laying matters of that sort before the jury, and so achieving for his client, if he can, a verdict of Not Guilty.

(1) (1876), 1 Q.B.D. 447, 449, 451.

(2) 73 J.P. 284; [1909] 2 K.B. 81, 87.

(3) (1787), 1 Leach 451.

(4) (1836), 7 C. & P. 303.

(5) (1831), 1 Lew. C.C. 64.

In the course of giving this ruling, I have not concerned myself with the question whether it is right for the prosecution to begin such matters, i.e., whether the burden is on the prosecution or on the defence to establish unfitness to plead. That is a mere matter of presumption one way or the other. The issue here is the fundamental one, not whether it is right or wrong for one side to take the point first—whether the prosecution should take it or whether the defence should take it—but, in effect, whether the position of the defence can be so put that learned counsel has to choose between fighting the general issue or dealing with the issue of unfitness to plead. On that fundamental question, I think that the submission made to me by counsel for the defence is the right one. The consequence of that, therefore, is that I shall not now swear the jury to try separately the question whether or not the defendant is fit to plead. They will be sworn merely to try the general issue.

[Counsel were asked by HIS LORDSHIP whether, in the circumstances, any difference of opinion existed between them as to what matters should be put to the jury on that, and what form of verdict they should be asked to return. They both intimated that there was no objection to the form of questions to the jury, or to the form of verdict, in *Berry's case* (1). HIS LORDSHIP continued:] I do not see why I should not leave the questions to the jury in the form in which they were left in *Berry's case* (1), but, if the jury return a verdict of Guilty, I shall take the course which the Court for Crown Cases Reserved took and make the order which that court said was the proper order to be made.

The indictment was then read, and a plea of Not Guilty entered by direction of the learned judge. Leading counsel for the defence did not desire any part of the proceedings to be interpreted to the defendant and DEVLIN, J., so directed, observing that, if there were no certain means of communicating with the defendant, there was no possible advantage in embarking on a doubtful means. The trial then proceeded. The Crown conceded that, unless certain purported statements by the defendant came before the jury, they could not be asked to convict. Evidence of such statements was, therefore, called first, at the suggestion of DEVLIN, J. It was debated whether an objection to this evidence that the defendant could not have made, and did not make, the purported statements was triable by the judge or was a matter for the jury. Objections going to the voluntary character of the purported statements (such objections being always triable by the judge) were also raised.

DEVLIN, J., gave the following ruling. I shall inquire into the two questions whether the statements which are alleged to have been made by the defendant were, in fact, his statements, and, if so, whether they were made voluntarily and in accordance with the Judges' Rules, and I shall reach that conclusion of fact on the latter question in the ordinary way. On the former question, it seems to me, subject to anything which counsel for the defence may say, that it would be right that, if I think there is some evidence fit to go to the jury that they were his statements, I shall admit the statements and let them go to the jury. If I do not think that there is any evidence fit to go to the jury that they are his statements, I shall rule them out.

[The Crown, with the approval of HIS LORDSHIP, offered no further evidence on the indictment. Evidence was heard on the circumstances of the defendant's detention, and the jury, by direction, found the defendant Not Guilty.]

Solicitors: *Director of Public Prosecutions* (for the Crown); *Myer Cohen & Co., Cardiff* (for the defendant). T.R.F.B.

(1) (1876), 1 Q.B.D. 447, 449, 451.



COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., BYRNE and PARKER, JJ.)

March 30, 1953

REG. v. HOLMES

*Criminal Law—Evidence—Insanity—Questions to medical witness.*

On a trial a doctor who was called for the defence with a view to establishing the defence of insanity was asked in cross-examination whether the appellant's conduct immediately after the killing indicated to him that the appellant at the time of the killing knew the nature of the act which he was doing and also knew that his conduct was contrary to the law of the land. It was contended that these questions were inadmissible on the ground that they were the questions which the jury had to decide.

HELD: that the questions were admissible in law and that it was proper for prosecuting counsel to ask them.

APPEAL against conviction.

The appellant was convicted at Nottinghamshire Assizes before STREATFIELD, J., of murder and was sentenced to death. The defence was that of insanity, and a doctor called for the defence was asked in cross-examination by prosecuting counsel the questions which were set out in the headnote.

C. N. Shawcross, Q.C., and Cotes-Predy for the appellant.

G. Terrell for the Crown.

LORD GODDARD, C.J., delivered the following judgment of the court. The appellant was convicted before STREATFIELD, J., at Nottinghamshire Assizes of murder. The case was one in which the defence set up the plea of insanity, the onus of proving which is on the prisoner. The medical witnesses for both the defence and the prosecution were agreed that at any rate at the time of the trial and probably previously the appellant was suffering from a disease of the mind, a particular form of paranoia.

The test of insanity, when it is sought to establish it as an excuse for a criminal act, according to the answers the judges gave in *M'Naghten's Case* (1), which were adopted by the House of Lords, is whether or not the accused person knew the nature and quality of the act he was doing. If he did not, that establishes insanity. If he did, one must then go further and ask whether he knew at the time of its commission that the act was wrong—wrong in the sense of contrary to law, not wrong in the sense of contrary to morals. In the present case the appellant, after a savage attack on the murdered person, went to a police station, gave himself up, said he was giving himself up for murder, and gave a detailed account of what he had done and how he had done it. A medical witness who was called for the defence, was asked in cross-examination:

"You remember that I asked you the question whether the accused's conduct immediately after this incident would indicate to you that he knew the nature of the act that he was committing and your reply was 'Yes'. That is so, is it not? A.—Yes. Q.—Would his conduct immediately after indicate equally that he knew his conduct was contrary to the law of the land. A.—Yes."

Counsel for the appellant has submitted that those questions were inadmissible. Whatever fine distinctions may have been drawn in days before or soon after *M'Naghten's Case* (1), we can only say that no member of the court has ever

(1) (1843), 10 Cl. & Fin. 200.

heard an objection being taken to such questions as those. Moreover, if the objection prevailed, it would, as it seems to us, put an insuperable difficulty in the way of the defence whenever they were trying to establish insanity. For instance, if a medical witness could not be asked whether the defendant's conduct immediately after the act in respect of which he was charged indicated that he knew his conduct was contrary to the law of the land, the doctor being prepared to answer "No", it would be a great hardship on the defendant who was setting up a plea of insanity if the doctor was not to be allowed to answer that question. It seems to the court that that is essentially a question that may be asked and answered. Counsel for the appellant has referred to a large number of cases in which the court has set out what is the right question and issue, and he has relied particularly on the judgment in *Rex v. Francis* (1) of ALDERSON, B., who evidently had not approved of the decision in *M'Naghten's Case* (2), where he said:

"The proper mode is to ask what are the symptoms of insanity, or to take particular facts, and, assuming them to be true, to ask whether they indicate insanity on the part of the prisoner."

When the learned judge says "insanity", he is using the word in the sense that it is understood in criminal law as an excuse for crime. Therefore, the question asked in the present case falls exactly within what the learned judge says is admissible because, to expand the question it is this: "Does the fact that the appellant went immediately to the police station, gave himself up, and wrote out a full description of the crime indicate to you insanity on his part, that is to say, insanity within the M'Naghten Rules, that he did not know that what he had done was contrary to law."

That is quite enough to dispose of this case, and this court does not propose to go into all the cases cited because, in their opinion, the matter is quite clear and it would be to introduce a great deal of confusion and injustice to an insane prisoner if we were to give effect to the argument. This appeal is dismissed.

*Appeal dismissed.*

Solicitors: *Registrar, Court of Criminal Appeal* (for the appellant); *Director of Public Prosecutions* (for the Crown).

T.R.F.B.

(1) (1849), 14 J.P. 24; 4 Cox C.C. 57, 58.

(2) (1843), 10 Cl. & Fin. 200.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(COLLINGWOOD AND KARMINSKI, J.J.)

May 4, 1953

JONES v. JONES

*Husband and Wife—Maintenance—Summons for maintenance on ground of desertion—Defence of reasonable and honest belief by husband in wife's adultery—Standard of proof.*

The defence to a charge of desertion on reasonable belief in a wife's adultery is one which in most circumstances is not susceptible of easy proof. It falls into the category of charges which may be easy to make and less easy to disprove. In cases where the defence is reasonable belief the defence should be fully and completely proved, and, unless it is so proved, it should be rejected.

The husband complained to the wife about her association with a police sergeant and at about 1.30 a.m. on Aug. 1, 1952, he saw her come out of a garage and run home by a circuitous route. Shortly afterwards he saw the sergeant also walk away from the garage. The husband spoke to the sergeant, but did not ask him if he had been speaking to his wife. Later that day the husband went to see a police inspector, the sergeant's superior officer, and made a statement to him. The husband thereupon left the matrimonial home on the ground that the wife had so conducted herself as to induce in him a reasonable belief in her adultery. On a summons by the wife alleging that the husband had wilfully neglected to provide her with reasonable maintenance,

HELD: there was no evidence on which a court could find that the husband had proved that he had a bona fide and reasonable belief in his wife's adultery; the statement to the police inspector was inadmissible and could not constitute corroboration of the husband's allegation; and the wife was entitled to an order for maintenance.

Observations of SIR RAYMOND EVERSHED, M.R., in *Allen v. Allen* (1951) (115 J.P. 229), applied.

APPEAL by the wife against the dismissal by the justices for the petty sessional division of Bangor on Sept. 18, 1952, of her complaint that her husband had wilfully neglected to provide her with reasonable maintenance.

The parties were married on Aug. 26, 1939, and there were three children of the marriage. At the hearing before the justices the husband stated that he had, after the war, spent some twelve months abroad in the services and that on his return he had cause to complain of his wife's association with a police sergeant; that on one occasion he, the husband, had noticed the sergeant ring his bicycle bell as he passed in the street which led him to believe that the sergeant was trying to attract the attention of his wife; that he had seen his wife speaking to the sergeant in the street; that he had heard something from neighbours; and that on Aug. 1, 1952, about 1.00 a.m. he was awakened by a child crying and found his wife not in her room, that he went out, saw the houses of two neighbours in darkness and waited on the corner of a street near a garage, that he saw their dog run in front of the garage, that he saw his wife come from the garage door and run by a circuitous route home, and that shortly afterwards he saw the police sergeant walk away, that he spoke to the police sergeant but did not tax him with having been speaking to his wife, and that on his return home his wife was lying fully clothed on her bed, looking terrified, and that she had explained that she had taken a circuitous route home because someone had thrown something at her and frightened her. The wife in evidence stated that, on the night in question, she had taken the dog out and visited the house of one of the neighbours where she had listened to a wireless programme for over an hour, that she then discovered that the dog had escaped, that she went to look for it and found it near the garage.

The neighbour was called, but the justices found that her evidence did not assist one way or the other. It was common ground that there was a quarrel when the husband returned home in the early hours of Aug. 1 and that later that day he left home. On that same day the husband also made a statement to a police inspector, the sergeant's superior officer.

On those facts the justices found that the husband had a bona fide belief, induced by the wife, that she had committed adultery, and dismissed her summons. The wife now appealed.

*Mars-Jones* for the wife.

*B. G. Irvine* for the husband.

**COLLINGWOOD, J.**, stated the facts and continued: It is well established by *Glenister v. Glenister* (1), and a number of subsequent cases in which that decision has been approved, that if a wife has so conducted herself as to lead any reasonable person to believe, until she gives some explanation, that she has committed adultery, a husband becoming aware of the facts and honestly drawing that inference and leaving his wife, ought not to be held to have left her without reasonable cause. Furthermore, with reference to the question of a husband's bona fide and reasonable belief in his wife's adultery, I will refer to a short passage at the conclusion of the judgment of **SIR RAYMOND EVERSHERD, M.R.**, in *Allen v. Allen* (2):

" . . . it seems to me that, if a man says: 'I bona fide and reasonably believe that my wife is an adulteress' as a defence in proceedings of this character, the result is neither irrational nor unjust if he be regarded as saying this: 'I say and allege that the evidence and materials in my possession are such that on them a court should and would find that adultery has been committed'."

Now, let me apply that criterion to the evidence before the justices in this case. I have already spoken of the association between the wife and the police sergeant so far as the conduct of the wife was concerned. Assume that she had been speaking to him in the street on one occasion (she can hardly have been held responsible for the ringing of a bicycle bell by the sergeant), and assume that on this occasion she had come at this hour of the morning from the vicinity of the embrasure by the garage door, the justices say that they

"considered that the complaint made by the husband to the police inspector on the first opportunity which he had was a material factor in his favour . . . After seeing and hearing both parties the justices accepted the husband's evidence in general and particularly his version of what he said he saw on the night of July 31, 1952. The justices came to the conclusion on the facts presented that the husband had a bona fide belief, induced by the wife, that she had committed adultery."

It is difficult to understand to what the first of those statements refers. These events happened in the early morning of Aug. 1, and the husband did, on Aug. 1, go to the police inspector, the superior officer of the sergeant, and somehow or other a statement was put in, which was a statement made to that officer. Clearly it was not admissible in evidence. That is conceded here today. Equally clearly it was not objected to. But how the justices can have decided that that complaint, made to the police inspector on the first opportunity which the husband had, was a material factor in his favour, I must confess I am quite unable to see. It looks as though they meant that it afforded

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

(2) 115 J.P. 229; [1951] 1 All E.R. 724.



corroboration of his evidence with regard to the events of the early morning of Aug. 1. Of course, that is not even argued. It cannot possibly afford such corroboration. I can only think that they are confusing the matter with a quite different class of case in which the fact that a complaint is made to a suitable person at the earliest opportunity after an offence has been committed is admissible as showing consistency of conduct on the part of the complainant, but what that has to do with this case I am quite unable to see. Taking the evidence of the husband at its highest, in my opinion, it is quite impossible to say that it comes anywhere near the test laid down by the Master of the Rolls in the passage to which I have referred. Further than that, according to LORD MERRIMAN, P., in *Glenister v. Glenister* (1):

" . . . the husband, becoming aware of the facts and honestly drawing that inference and leaving his wife on that ground ought not to be held to have left her without reasonable cause."

In his cross-examination in the present case the husband was asked a number of questions bearing on his state of mind, and he said in answer to those questions:

" I am contesting the case because I caught her out with Sergeant — at twenty to two in the morning, and, in my opinion, that is an offence. I left home because she ran away and there was a person whom I had continually told her about. I cannot say whether he had committed adultery with her."

He does not there suggest that he entertained a suspicion of his wife's adultery. What he is saying is: " I had warned her about not talking to this man before, and I found that she was disobeying me, and disobeying me at this hour in the morning, and I think that is an offence ". In my opinion, it is quite impossible to say that the wife had given reasonable grounds for belief in her adultery, even if the husband had gone to the length of saying that he entertained such a belief.

In my opinion, the justices here have misdirected themselves as to the requirements to comply with the decision in *Glenister v. Glenister* (1), and they have misdirected themselves with regard to the statement to the police inspector. I am not losing sight for one moment of the oft-repeated principles laid down by the House of Lords in *Watt (or Thomas) v. Thomas* (2). I think this case falls clearly within the third of the principles enunciated by LORD THANKERTON in that well-known judgment, and for that reason the finding cannot stand. We have not the material before us on which to decide the amount of maintenance which should be awarded to the wife, and, therefore, it will be necessary for the matter to be remitted to the justices for them to ascertain that amount. We do find, however, wilful neglect to maintain.

**KARMINSKI, J.:** I agree. This is a case where the justices expressed a preference for the version of the facts given by the husband over that given by the wife, and I agree with my Lord that their conclusions on that finding are unsatisfactory. They found that there was a material factor in favour of the husband, viz., the fact that his complaint about the behaviour of his wife and the police sergeant was made to the police inspector at Bangor on the first available opportunity. The statement made by the husband to the police inspector seems to have been put in in re-examination, no objection was taken to it, and it reached the file of this court. But how that statement can in any

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

(2) [1947] 1 All E.R. 582; [1947] A.C. 484.

way be a material factor in the husband's favour, I am unable to understand. Be that as it may, it appears, on reading the justices' reasons, to have influenced them, and if that is right, and I believe it is, then we are not precluded, as my Lord has pointed out, from questioning, and, indeed, dissenting from, the justices' finding on the facts. But even if the facts as found by the justices were right, I am satisfied that they misdirected themselves seriously as to the requirements of the law in cases of this kind. In their reasons they say

"The leading case of *Glenister v. Glenister* (1) was cited by the husband's solicitor in his closing address . . . The justices retired and traversed the evidence. They called in their clerk and asked for his guidance regarding the authority quoted. He read out the headnote and the judgments, and also read out the case of *Chilton v. Chilton* (2), which he advised was relevant to the present case."

I do not know from that what advice the clerk gave, or whether such advice was accepted or not. The principle of law is clear enough, and has often been stated both in this court and in the Court of Appeal. I have considerable doubt whether the justices really understood it, or how, if they did, they could have come to the conclusion at which they arrived.

I desire to add one cautionary note about cases of this kind. Adultery is a defence to charges of desertion and of wilful neglect to provide reasonable maintenance. So is a reasonable belief, honestly maintained, by a husband in his wife's adultery. In this case, no affirmative defence of adultery was raised. The omission is not, perhaps, surprising, since, on the evidence before the justices, it would appear to have been quite impossible to have presented even a *prima facie* case of adultery. The husband, therefore, was driven to rely on the defence of reasonable belief in his wife's adultery. In my view, the defence of reasonable belief in a wife's adultery is one which in most circumstances is not susceptible of easy proof. Nor should it be. It falls into the category of charges which may be easy to make and less easy to disprove. Here the husband produced virtually no evidence on which a charge of reasonable belief could be founded. Nevertheless, before the justices he succeeded. I believe it to be implicit that in cases like this, where the defence is reasonable belief, the defence should be fully and completely proved, and that unless it is so proved it should be rejected.

I agree with my Lord that this appeal must be allowed, that the husband be found to have wilfully neglected to provide his wife with reasonable maintenance, and that the matter be remitted to the justices to establish the amount of maintenance to be awarded.

*Appeal allowed.*

Solicitors: *Rhys Roberts & Co.*, agents for *Price White & Co.*, Bangor (for the wife); *Mawby, Barrie & Letts*, agents for *Silverman & Livermore*, Liverpool (for the husband).

G.F.L.B.

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

(2) 116 J.P. 313; [1952] 1 All E.R. 1322; [1952] P. 196.

COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., HALLETT and DONOVAN, JJ.)

June 9, 1953

REG. v. WILSHER

*Criminal Law—Sentence—Corrective training—Release on licence—Offence committed during period of release—Sentence of corrective training consecutive to such sentence already being served.*

On Jan. 27, 1953, the applicant was convicted at the Central Criminal Court of office breaking and was sentenced to four years' corrective training. At that time he had been committed for trial at Essex Assizes on other similar charges, and on conviction thereof at the assizes on Feb. 20, 1953, he was sentenced to two years' corrective training to run consecutively to the sentence already being served.

HELD: that the sentence passed at assizes was correct and proper.

Per curiam: When an offender who has been sentenced to a term of corrective training and released on licence commits a further offence while he is on licence, a sentence of imprisonment should be imposed in respect of the further offence unless the Prison Commissioners recommend the offender for a further sentence of corrective training, in which case the court can exercise its discretion to pass either a sentence of imprisonment or one of corrective training.

APPLICATION for leave to appeal against conviction.

On Jan. 27, 1953, the applicant was convicted at the Central Criminal Court of shopbreaking and was sentenced to four years' corrective training. At that time he had been committed for trial at Essex Assizes, where, on Feb. 20, 1953, he was convicted of office breaking, larceny, office breaking with intent to commit a felony, and causing grievous bodily harm to a police constable, and was sentenced by HALLETT, J., to two years' corrective training to run consecutively to the sentence passed at the Central Criminal Court.

No counsel appeared.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: There is no ground for interfering with the conviction of the applicant. HALLETT, J., having heard that the applicant had been sentenced at the Central Criminal Court to a sentence of corrective training, felt himself to be in a difficulty because this court has said in *Reg. v. Talbot* (1) that it is undesirable to pass a sentence of imprisonment when an offender who is undergoing a sentence of corrective training is brought before the court for a further offence which has not been tried at the time when he received the sentence of corrective training, because that would mean that the moment he finishes his corrective training he will have to undergo imprisonment, and that, very likely, would do away with any good he may have received from the corrective training. In the present case, the applicant having received that sentence of corrective training, the learned judge thought—in our opinion, quite rightly—that the only thing to do was to add some period to his term of corrective training, and so he passed a sentence of two years' corrective training, which would mean that the applicant would serve at least an additional year, because it was to follow consecutively on the sentence that he was already serving.

So far as that is concerned, the court entirely approve, but it occasionally happens that when offenders who have been sentenced to corrective training are released on licence, they commit offences while they are on licence. Since the coming into force of the Criminal Justice Act, 1948, s. 56 (1), where an offender

(1) 117 J.P. 119; [1953] 1 All E.R. 340.

earns a remission of imprisonment, the sentence comes to an end. The position is not the same in the case of corrective training, or, as a matter of fact, preventive detention. If an offender has been sentenced to corrective training he can be released on licence, but he is liable to be recalled if he commits an offence while he is on licence. Certain recorders have recently found difficulty in dealing with cases where offenders have committed offences while they are on licence. They are told that the Prison Commissioners will recall the offenders, and very often the commissioners report that the offenders in question have shown that they receive no benefit from corrective training and that they do not recommend them for a further sentence of corrective training. The court thinks that in a case where an offender commits an offence while on licence a sentence of imprisonment should be imposed unless the Prison Commissioners report to the court that they think that a further period of corrective training may be of use. Then the court can exercise its discretion whether to pass a sentence of imprisonment or one of corrective training, but, unless there is that report, the only way in which the case can be dealt with is by passing a sentence of imprisonment. In the present case there is no application for leave to appeal against sentence, and, therefore, it is not necessary to say more than that the application for leave to appeal against conviction is dismissed.

*Application dismissed.*

T.R.F.B

### COURT OF APPEAL

(SINGLETON, JENKINS AND MORRIS, L.JJ.)

April 22, 1953

#### RICH AND ANOTHER v. LONDON COUNTY COUNCIL

*School—Negligence—Duty of education authority to pupil—Pupil injured on school premises—Liability of authority.*

The first plaintiff was a pupil at the infants' section of a school under the care and management of the London County Council as education authority. For some years the school authorities had kept loose coke in one of the school playgrounds and had not fenced it against interference by the pupils. Whilst on the school premises the infant plaintiff was injured by a piece of coke thrown at him by a fellow pupil and as a result he lost his left eye. In an action for damages for negligence,

**HELD:** the defendants were under no duty to fence in or safeguard the coke so as to prevent the pupils from having access to it, their duty to the pupils was to take such care of them as a careful parent would exercise in similar circumstances; they had discharged that obligation; and, therefore, they were not liable to the plaintiff.

*Jackson v. London County Council & Chappell* (1912) (76 J.P. 37, 217), distinguished.

Principle stated by LORD ESHER, M.R. in *Williams v. Eady* (1893) (10 T.L.R. 41) applied.

**APPEAL** by the defendants from an order of SLADE, J., dated Dec. 2, 1952.

The plaintiffs were Derek Anthony Rich, an infant pupil at the Montem Street School, Tollington, London, N.4, and his father, Sidney Leonard Rich. The defendants, the London County Council, as education authority, had many schools under their care and management, including the school attended by the infant plaintiff. Owing to the difficulties during and after the war in obtaining regular supplies of fuel, it was essential for the school authorities to keep at the school quantities of fuel in hand in excess of the amount that could be stored in the storage places provided, and at the material time there was an unfenced heap



of coke in the senior playground amounting to some three tons. On Feb. 16, 1950, the infant plaintiff was hit by a piece of coke thrown by another pupil as a result of which he lost his left eye. In an action against the London County Council for damages for personal injuries, the plaintiffs alleged that the defendants had been negligent in that "the defendants their servants or agents failed to provide adequate or proper supervision while the children were playing in the said playground. The defendants their servants or agents failed to fence in or safeguard against interference by children the said heaps of coke, well knowing that the said children were in the habit of playing on the heap of coke and using pieces thereof as missiles." SLADE, J., found, *inter alia*, that in the circumstances the defendants were obliged to keep the heap of coke in the playground and that there was adequate supervision of the children by the school staff. He held, however, that the defendants had been negligent in failing to take any steps to protect the coke or to prevent the boys from having access thereto, and gave judgment for the plaintiffs.

*Lloyd-Jones, Q.C., and F. H. Lawton for the defendants.*

*Berryman, Q.C., and S. I. R. Craig for the plaintiffs.*

SINGLETON, L.J., stated the facts and continued: Counsel for the defendants has submitted that the judgment of SLADE, J., is wrong, that it goes too far, and that it places too high a duty on those who manage and conduct a school such as this was. Counsel on behalf of the plaintiffs has submitted that this was a question of fact for the decision of the learned judge, and that there was evidence on which he could come to the conclusion at which he arrived. I need hardly say that a finding of fact by the judge of first instance based on the evidence of witnesses whom he sees and hears will always receive full consideration in this court, and it is only if this court is satisfied that the conclusion of the judge is wrong that it will interfere. Counsel is right to a large extent in describing this question as a question of fact, but before a proper decision can be reached on that question of fact it is necessary to ascertain the measure of duty owed to a child by those responsible for the management of a school.

The learned judge was of the opinion that the defendants were obliged to store additional coke somewhere, and, as there was no place under cover in which they could put it, they put it in the senior boys' playground. The fact that there was this heap of coke in the senior boys' playground was an anxiety and a burden to the teachers and to the school authorities. The head mistress had complained and reports had been made from time to time. It was known that children often throw missiles at one another. The little boy who lost his eye was asked about it, and he said that he knew that things should not be thrown and that he would be punished if he did throw things. The school keeper said, in his evidence, that whenever he found boys playing on the coke he chased them away. They were a little out of hand until January, 1950, when a new headmaster came.

As I have said, SLADE, J., found that there was no practical alternative for the county council to adopt. They had to have a heap of coke in the yard. Further, he found that the infants were supposed to keep to their own part of the playground, and not to go into the playground which was for older children. He found that there was adequate supervision, and he accepted the evidence of the head mistress and of the other mistresses and helpers who were called that there was adequate supervision and that no supervision would have prevented this accident, for children will do some things at a time when the

teacher's back is turned. He found, further, that the boys knew that they would be punished if they threw missiles, and he said:

"The question resolves itself into whether something ought to have been done physically to prevent access to these dumps of coke so long as they remained in playgrounds accessible to children, and to as many as two hundred and seventy children in the infants' school alone."

The judge referred to the case to which our attention has been directed, *Jackson v. London County Council & Chappell* (1). The facts in that case were that a contractor, who was to carry out certain repairs at a public elementary school, left a quantity of rough material composed of sand and lime in a truck in a corner of the school playground. The head master of the school gave instructions to the school caretaker to have the material removed, as he considered that it was dangerous, and the caretaker telephoned the contractor asking him to remove it. When the boys came out of school the material had been left unguarded, and one of the boys threw a portion of it at the plaintiff, who was also a scholar at the school, injuring his eye. In an action by the plaintiff against the education authority and the contractor for damages, it was held that there was evidence on which the jury could find both the education authority and the contractor guilty of negligence. When the facts are examined, it would appear that the head master's anxiety was lest a boy should play with the truck itself and tip it up in some way. That in fact happened, and, after the truck had been tipped and the mixture in it was strewn about, the boys threw pieces at each other. The contractor had failed to do what the head master had asked him to do. Thereafter it was difficult for the head master to say that he did not think it was dangerous, and it could be said that he owed a duty to the boys to have the danger removed, if danger there was. The action was against both the contractor and the London County Council, as the education authority. After verdict the question was raised whether there was evidence to go before the jury, and BRAY, J., in giving judgment, said that he had grave doubt whether there was any evidence of negligence in the case fit to go to the jury. He told the jury that they must be reasonably satisfied that the accident which happened was one which might reasonably have been anticipated by the defendants and guarded against. The real question was whether there was any evidence as to that. It was so much a question of degree that it was difficult to say when near the boundary line on which side the case fell. It was more a question of fact than of law. After giving judgment for the amount awarded by the jury, £50, his Lordship added that he had so much doubt about the case that there would be a stay of execution without any terms in order to give the defendants an opportunity of appealing. There was an appeal which came before a court consisting of VAUGHAN WILLIAMS, FARWELL and KENNEDY, L.JJ. VAUGHAN WILLIAMS, L.J., having read the questions that had been left to the jury and their answers, said (76 J.P. 218) that the effect of them was that the jury must have found that the barrow was a dangerous thing to leave where it was. He did not know whether the jury were influenced by sentimental sympathy in favour of the boy. The evidence against the schoolmaster was that he recognised the barrow as a source of danger, and with regard to the contractor it was clear from the evidence that he was told to take some steps to remove the barrow, but that he had not acted sufficiently. In his judgment, the appeal failed and must be dismissed, and FARWELL and KENNEDY, L.JJ., agreed. It appears that in both the court of first instance and in the Court of Appeal grave doubt was

(1) (1912), 76 J.P. 37, 217; 28 T.L.R. 66, 359.

felt as to the result. It is not clear whether there was a submission before the case went to the jury that there was no evidence fit for the consideration of the jury. The matter was argued after verdict, and BRAY, J., although he was in very considerable doubt, thought that there was sufficient evidence to go before the jury, and the Court of Appeal held that the jury's verdict could be supported. That is as far as the case goes. I venture to point out that the case differs on its facts from this case in that something unusual had been brought on to the school premises, viz., a laden truck, and the head master's fear was that the boys might play with that truck and cause some damage or hurt themselves. In this case there was a heap of coke, as there had been since about 1941, for until 1950 the difficulties of getting regular supplies of coke had not been overcome even by the London County Council.

We have to consider whether or not the judgment of SLADE, J., can be supported on the facts proved before him and accepted by him. Perhaps the most important of his findings is that there was adequate supervision. There was a large number of pupils in the infants' side of this school, but there were plenty of people to supervise them, and they were properly supervised during their playtime. That is the finding of the learned judge. Having considered the authorities, he adopted the test stated by LORD ESHER, M.R., in *Williams v. Eady* (1). That was an action by a boy against a schoolmaster for an injury alleged to have been caused by his negligence in leaving a bottle of phosphorus about. LORD ESHER, M.R., said:

" . . . as to the law on the subject there could be no doubt; and it was correctly laid down by the learned judge, that the schoolmaster was bound to take such care of his boys as a careful father would take of his boys, and there could not be a better definition of the duty of a schoolmaster."

That test has been the one adopted ever since. SLADE, J., continued:

"I feel sympathy with the London County Council for the position in which they found themselves, with adequate reasons for storing the coke where they did, no practical or practicable alternative, adequate supervision (as I have found), adequate exhortation and instructions (as I have found). But with the knowledge that they had, and, if they did not have it, with the knowledge that they ought to have had (and I am satisfied that they did have it), what should they have done, bearing in mind their duty to which I have already referred? It seems to me that there were only one of two things that they could have done to discharge that duty, and that is: (i) remove the coke from the playgrounds, or (ii) take steps to ensure that it was no longer accessible to the boys. If they could not do (i), then they could have done (ii). They need not have put up a wire fence in case it had the risk which Dr. Topping envisaged. What they could have done was to put up some form of fence or wooden structure which would have, for all practical purposes, prevented the boys from having access to the coke . . . Posing the question to myself: What would a careful father have done towards his own son, with knowledge of that risk which his son was running being pointed out to him over and over again; would such a father have left the coke there unprotected, with the consequences which the father knew might ensue and which, in due course, did ensue? I answer the question by saying that no careful parent would so have acted, and I accordingly find that the defendants were

(1) (1893), 10 T.L.R. 41.

negligent in not taking steps to protect the coke or prevent the boys from having access to the coke."

I cannot accept that. It seems to me that it is putting much too high a burden on the education authority, and, in my view, it is stating the way in which a father would approach the duty to his children in too general a way. I wonder how many yards in private houses or attached to public buildings have been without some fuel in the yard or yards in recent years. One who looks from a window in this building can see coke or some other fuel in the yard. It has to be kept there, I assume, because of the difficulty in getting regular supplies. That difficulty may be resolved. As the learned judge pointed out, it is regarded as a temporary difficulty, but he says that a careful father, looking on a matter of this kind, would say: "I must have this fenced for the safety of my children." What expense would be incurred in the small back yard of a private house or what it would be in the case of one school in the London County Council area I do not know. I do know, however, from the evidence that no one said that an accident of this kind, arising from the throwing of coke, had ever happened before, and no one said that any infant was known to have taken a piece of coke and thrown it at another child in this school before. Yet it is said that the duty of the education authority is either not to have the heap of coke there or to put up some form of fence or wooden structure which would, for all practical purposes, have prevented the boys from having access to the coke. That would mean putting up some structure over which boys could not climb, for, if it were something over which boys could climb, it would not, for all practical purposes, prevent the boys from having access to the coke. I cannot accept that as the duty in these circumstances.

SLADE, J., found that the supervision at this school was adequate. The school keeper said that there had been no trouble in regard to the coke since the new head master came in or about January, 1950, approximately a month before this accident. An accident of a most unfortunate kind occurred, but I do not see that the defendants can be blamed for it. If this be a question of fact, I am bound to say that I take a different view from that of the learned judge, but I am not sure that it is wholly a question of fact. It is necessary to look at the test which SLADE, J., laid down. He found that in the circumstances the duty on the London County Council was to do one of two things: either to remove the coke or to take steps to ensure that it was no longer accessible to the boys. I do not agree with that. If their supervision was adequate, it was not necessary that they should take steps to ensure that the coke was no longer accessible to the boys. Their duty was to exercise the care which a careful parent would exercise in the like circumstances. On the evidence in this case I do not find that they failed in that duty. For those reasons I am of opinion that this appeal should be allowed and that judgment should be entered for the defendants.

HODSON, L.J., stated the facts and continued: The learned judge, in a very careful judgment, directed himself perfectly accurately as to the law when he said, quoting LORD ESHER, M.R., in *Williams v. Eady* (1), that a master was bound to take such care of his pupils as a careful father would take of his children, and he sought to apply that standard to this case. In doing so, he first considered the question of supervision and said:

"First, I am satisfied that there was adequate supervision of the infants during the breaks and on this occasion. Miss Price (the teacher in charge)

(1) (1893), 10 T.L.R. 41.



was there the whole time actually standing in the bay where the infants were supposed to remain except for the purpose of going to the lavatory. If they went to the lavatory, there was Mrs. Logan, the infants' helper, again to shepherd them and to prevent them from going astray, that is to say, where they were not supposed to be. It so happened that another boy had chosen, about the same moment, to run his head into a wall, and Mrs. Logan's attention was temporarily taken up with attending to that boy, as, indeed might always happen whatever degree of supervision she could exercise. It is sufficient for me to leave it at that and to say that I am satisfied that the supervision was adequate, and I am satisfied, moreover, that no supervision, even if more than adequate, would have prevented this accident. One can supervise as much as one likes, but one will not stop a boy being mischievous when one's back is turned. That, of course, is the moment that he chooses for being mischievous. Secondly, I am satisfied that Miss Camburn [the head mistress of the infants' school] did everything that she possibly could in the way of instruction, exhortation, and threat of punishment, and I am further satisfied that Malcolm, when he threw this piece of coke, and Derek, when he was about to throw it back again, knew perfectly well that they were doing wrong and that they would be punished or would be liable to be punished if they were caught."

Having arrived at that finding of fact and having found that it was reasonable for the London County Council to have coke stored on the premises, the question is whether the learned judge was right in going further and demanding of the defendants something more than the supervision which he had already said was adequate. With all respect to him, I think that in that the learned judge fell into error. In his judgment he said:

"But with the knowledge that they had, and, if they did not have it, with the knowledge that they ought to have had (and I am satisfied that they did have it), what should they have done, bearing in mind their duty to which I have already referred? It seems to me that there were only one or two things that they could have done to discharge that duty and that is: (i) remove the coke from the playgrounds, or (ii) take steps to ensure that it was no longer accessible to the boys. If they could not do (i), then they could have done (ii) . . . What they could have done was to put up some form of fence or wooden structure which would have, for all practical purposes, prevented the boys from having access to the coke."

The impracticability of keeping children from access to missiles by the erection of physical barriers has only to be stated to be reasonably obvious, in my view, and one would have thought that on this footing this case was very difficult to argue. One has only to envisage the difficulties of a master taking a party of children to the seaside—an argument which, we are told, was put before the learned judge in this case—to realise to what lengths one is led when one considers means which might have to be employed to prevent children picking up missiles. I think that the only crumb of assistance which the plaintiffs have been able to obtain in this case is derived from the fact that in *Jackson's* case (1), to which my Lord has referred, an accident occurred in circumstances not wholly dissimilar from those in this case and the plaintiff succeeded. I would draw attention to the fact that the only decision there

(1) (1912), 76 J.P. 37, 217; 28 T.L.R. 66, 359.

was that there was some evidence on which the jury could arrive at the conclusion at which they did arrive and that, so far as the short report of the case goes, it does not appear that any steps were taken to supervise the children or to guard against the accident which did occur. On the contrary, in this case the evidence was strong, and it was accepted by the learned judge, that so far as supervision was concerned the steps taken were adequate, and so far as exhortation and instruction were concerned again adequate steps were taken directed to this particular point, namely, the throwing of missiles. In my judgment, therefore, treating this matter as an exceptional case in which this court is taking a different view of the facts from that taken by the learned judge who carefully examined them in the first instance, this appeal must be allowed.

MORRIS, L.J.: I have reached the same conclusion. It is common ground between the parties in this case that it was the duty of the London County Council, as the education authority, to act as a reasonable, careful and solicitous parent would have acted in the circumstances. The learned judge towards the end of his judgment poses for himself the question how a careful parent would have acted and whether such a parent would or would not have left the coke unprotected. Counsel for the plaintiffs has emphasised before us the consideration that Miss Camburn appreciated that there were risks attendant on the accessibility, within the area of the school premises, of the pile of coke. Not unnaturally Miss Camburn, as a careful head mistress, desired to protect herself in every possible way, and she called the attention of those above her to the possibility that the presence of the coke might lead to some unfortunate circumstances. The question that is raised in this appeal is whether it can be said to be negligent in a reasonable, careful and solicitous parent to permit the accessibility to a child of something that may conceivably be used as a missile if every reasonable supervision is exercised over the child. In my judgment, such a question must be answered having regard to the facts and circumstances of each case. It is of great consequence in this case to have in mind that the learned judge has found that there was nothing lacking in the supervision of the children and in the measure of exhortation that was given to them. But he came to the conclusion that on the facts of this case a careful parent would not have left the coke unprotected. As this is a question which, in my judgment, can be determined equally well by this court, having all the evidence and the findings of fact before us, as it could have been determined by the learned judge, I feel free to form my own conclusion, which differs from that reached by the learned judge. This was a case where everything reasonably possible that could be done was being and had been done to look after the children. It is true that there is a propensity in children to throw things. Their ingenuity in finding things to throw may be difficult to circumvent. It seems to me that it cannot be said that it is the duty of a reasonable, careful, and solicitous parent to endeavour to put a child into a straight jacket or to seek to remove from his reach anything that may conceivably be used by him to indulge his mischievous propensity, always provided that reasonable, proper, and adequate supervision over the child is exercised. I do not consider that it has been shown that in this case the defendants fell short in the fulfilment of the duties which lay on them.

*Appeal allowed.*

Solicitors: *J. G. Barr* (for the defendants); *Mark Lemon* (for the plaintiffs).

P.P.

## QUEEN'S BENCH DIVISION

(PEARSON, J.)

May 13, 14, 15, June 4, 1953

## HAWKINS v. COULSDON AND PURLEY URBAN DISTRICT COUNCIL

*Negligence—Licensee—Need to prove knowledge by licensor of facts constituting danger—Reasonable appreciation of risk—Accident in dark—Risk obvious in daylight—Defective steps of requisitioned house—Liability of requisitioning authority.*

On Oct. 5, 1951, the plaintiff, who had been visiting an occupier of part of a house which had been requisitioned since 1946 by the defendants, fell and broke her leg while descending the steps from the front door after dark. One of the steps was broken. The defendants had knowledge of this, but the learned judge found that the defect was not obvious to the plaintiff and was not reasonably to be expected by her.

HELD: a licensee moving in the dark did not in all cases take the risk of any danger which in daylight would be obvious; to entitle the plaintiff to succeed it was enough for her to show that the defendants knew the facts constituting the danger and that a reasonable man, having that knowledge, would have appreciated the risk involved, and she need not show that the defendants in fact appreciated that risk; the plaintiff had discharged the burden which was on her; and, therefore, she was entitled to judgment.

*Cooke v. Midland Great Western Ry. of Ireland* ([1909] A.C. 229) and *Latham v. Johnson (R.) & Nephew, Ltd.* (1912) (77 J.P. 137), applied.

## ACTION for damages for negligence and/or breach of duty.

In 1939 a house, No. 2, Valley Road, Kenley, Surrey, belonging to Mrs. Anne Elizabeth Jane Reddish, was requisitioned for civil defence purposes and was used as a first aid post. It sustained damage during the war from bomb-blast, and was de-requisitioned. A war damage claim was made and some repairs were carried out. In August, 1946, the defendants, the urban district council of Coulsdon and Purley, requisitioned the house under the Defence (General) Regulations, 1939, reg. 51, for housing persons who were inadequately housed, and a schedule of condition was prepared by an independent architect on behalf of the defendants. This was signed on behalf of the defendants by their surveyor and by Mrs. Reddish as owner. The schedule referred, inter alia, to the fact that the three stone steps of the front porch were worn and that one of them was broken at the corner. Between 1946 and 1951 the house was re-decorated and minor alterations and repairs were carried out in accordance with standards of repair laid down by the Ministry of Health, but no repairs were made to the steps. The occupiers of the house made no complaints to the defendants about the condition of the steps. On Oct. 1, 1951, although the property was still requisitioned, Mrs. Reddish was allowed by the defendants to enter into occupation of the upper floor of the house. On the evening of Oct. 5, 1951, the plaintiff, Mrs. Eva Lilian Hawkins, came to visit Mrs. Reddish. She had visited the house before the war, but had not been there since its end. She left the house at about 8 p.m., when it was dark. As she was coming down the steps from the front door, she put her foot on the broken step which gave way beneath her and she fell and broke her leg. There was a street lamp on the pavement outside the house, but between the lamp and the front door there was a fir tree and on the night in question it was very dark and misty so that the lamp was not effectively lighting the doorway.

The plaintiff claimed damages from the defendants, contending that by virtue of the requisition they were in occupation and/or control of the porchway, steps and approaches to the house; that she used them on the evening in question as the defendants' licensee, being on a visit to the person occupying the upper

floor of the house under an agreement with the defendants; that the defendants owed her a duty to take reasonable care to prevent her from suffering damage on the occasion of that visit from any hidden danger or trap in the porchway, steps, or approaches of which they were aware; that the porchway and/or steps and/or approaches constituted at all material times a hidden danger or trap; that, as the defendants well knew, they were unlit, the surface was worn, and a large portion of the lowermost step had been previously broken off and was missing; and, in breach of their duty, and/or negligently, the defendants had failed to take reasonable care to prevent injury to persons using the steps. The defendants denied the allegations and contended that the plaintiff used the steps with full knowledge of their condition (as to which they made no admissions), and/or without keeping a proper look-out, and/or without due care for her own safety.

*F. Whitworth* for the plaintiff.

*Van Oss* for the defendants.

*Cur. adv. vult.*

June 4. **PEARSON, J.**, read a judgment in which he stated the facts and continued: I make the following findings of fact or of mixed fact and law:—

(a) The defendants were in possession and control of the steps. (b) The plaintiff was using the steps as a licensee of the defendants. (c) The bottom step had been badly broken for at least a year and was dangerous, being likely to cause an accident, especially to a person descending the steps at night. The south end of the steps would be more frequently used, but the north end would be sometimes used, for instance, if two persons went down the steps together, or if one person intended to walk round the bonnet of a waiting car to the near side front passenger's seat. (d) Even if the lamp was lit, as I think it probably was, there was not enough light to enable a normally careful person, coming out of a well-lighted room and descending the steps on a dark night, to see that the bottom step was broken. (e) The badly broken step was a concealed danger to the plaintiff, who was using the steps by night and did not know that one of the steps was broken. (f) The plaintiff was not careless of her own safety either in failing to notice the broken step when she walked up on the other side of the steps shortly before lighting-up time on the same day, or in walking down the steps in the dark without waiting for a torch to be brought or for the headlights of the car to be turned on, or in any other way. Although she was not entitled to assume that the steps were in good condition, she could, in my opinion, reasonably assume that she would be treading on a step and not into a hole or on to loose and movable fragments of a broken step. (g) The accident was caused by the concealed danger constituted by the badly broken step and the deficiency of light. (h) The physical facts constituting the danger, namely, the badly broken step and the deficiency of light, were known to the defendants through their officers concerned with the condition of the requisitioned property. (i) A reasonable man, having the defendants' knowledge of the physical facts, would have appreciated the risk involved. (j) It was not proved, and I do not consider there are sufficient grounds for inferring, that the defendants appreciated the risk involved. If they had, they would, presumably, have incurred the small expense necessary to remove the danger by cementing in the broken pieces.

With regard to the position of a licensee walking in the dark there are numerous reported cases, including *Hounsell v. Smyth* (1) (relating to an open

(1) (1860), 7 C.B.N.S. 731.



quarry on waste land); *Wilkinson v. Fairrie* (1) (relating to a staircase in a passage); *Huggett v. Miers* (2) (relating to an unlighted staircase in an office building); *Lewis v. Ronald* (3) (relating to an unlighted staircase); *Mersey Docks & Harbour Board v. Procter* (4) (relating to dock premises); *Coleshill v. Manchester Corpn.* (5) (relating to a trench on a road in course of construction); *Caseley v. Bristol Corpn.* (6) (relating to an unfenced dock); *Rochman v. J. & E. Hall, Ltd.* (7) (relating to an unlighted lift). The subject is discussed in *SALMOND ON TORTS*, 11th ed., at p. 573, and in *WINFIELD ON TORTS*, 5th ed., at pp. 582, 583; and (in relation to invitees) in *CHARLESWORTH ON NEGLIGENCE*, 2nd ed., at pp. 194-196. The principle to be applied is stated by LORD SUMNER in *Mersey Docks & Harbour Board v. Procter* (4) as follows:

"A licensee takes premises, which he is merely permitted to enter, just as he finds them. The one exception to this is that, as it is put shortly, the occupier must not lay a trap for him or expose him to a danger not obvious nor to be expected there under the circumstances. If the danger is obvious, the licensee must look out for himself: if it is one to be expected, he must expect it and take his own precautions. If he will walk blindfold, he walks at his peril, even though he is blindfolded by the action of the elements. As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen. The licensee is to take reasonable care of himself and cannot call a thing a trap, the existence of which a reasonable man would have expected or suspected, so as to guard himself from falling into it."

Applying that principle, I find that this badly broken step in an apparently ordinary short flight of front door steps was not obvious to the plaintiff, descending at night, and was not to be expected there in the circumstances, and was a danger, the existence of which a reasonable man, using reasonable judgment and conduct in the circumstances, would not have expected or suspected. In my judgment, there is no absolute rule of law that in all cases a licensee moving in the dark takes the risk of any danger which in daylight would be obvious.

Another question arises, which is one of law and presents considerable difficulty. To be entitled to recover, the licensee must show that the danger was known to the licensor. Is it enough for the licensee to show that the licensor knew the physical facts constituting the danger and that a reasonable man, having that knowledge, would have appreciated the risk involved? For convenience, I will call that "the objective test". If that is the right test to apply, the plaintiff succeeds on my findings set out above. Or is it necessary for the licensee to show, directly or by inference, that the licensor appreciated the risk involved? I will call that "the subjective test". If that is the right test to apply, the plaintiff fails. Interesting arguments on this question were presented by counsel for the defendants and by counsel for the plaintiff. The

(1) (1862), 1 H. & C. 633.

(2) [1908] 2 K.B. 278.

(3) (1909), 101 L.T. 534.

(4) [1923] A.C. 253.

(5) 92 J.P. 37; [1928] 1 K.B. 776.

(6) [1944] 1 All E.R. 14.

(7) [1947] 1 All E.R. 895.

question was expressly left open by the Court of Appeal in *Baker v. Bethnal Green Borough Council* (1) (109 J.P. 78), and in *Pearson v. Lambeth Borough Council* (2) (114 J.P. 217). I, therefore, reserved judgment in this case and have investigated the earlier decided cases in search of guidance on this question.

In *Bolch v. Smith* (3) WILDE, B., made some observations on the liability of a licensor in respect of traps. He said:

"If A gives B permission to cross his yard in which there are several ways, and there is a pit in the yard which is usually covered, but on a particular night it being uncovered B falls into it, I can understand that A would be liable. But if the hole has always been uncovered, and B in broad day walks into it, would A be liable?"

and then he said:

"That disposes of the case; but I will add that I do not mean to say that if the defendant had made a hole in the yard, and had covered it in a way that was insufficient, but which appeared to be sufficient, he would not have been liable. But here there was nothing of that character. The danger was open and visible; there was nothing which could be called a 'trap'."

Those observations are consistent with "the objective test", but were not necessarily intended to be a full statement of the facts required to be proved in order to establish the liability. In any case, they were obiter dicta.

In *Indermaur v. Dames* (4), which is the leading case on the liability of an invitor to an invitee, the judgment of the court (consisting of ERLE, C.J., WILLES, KEATING and MONTAGUE SMITH, JJ.) was delivered by WILLES, J., and contains the following passage:

"It is observable, that, in the case of *Southcote v. Stanley* (5), upon which much reliance was properly placed for the defendant, ALDERSON, B., drew the distinction between a bare licensee and a person coming on business, and BRAMWELL, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of. There is considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver, for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver."

That was an obiter dictum, but of the whole court, and the judgment was approved in the Court of Exchequer Chamber.

In *Gautret v. Egerton. Jones v. Egerton* (6) there was a demurrer to the declaration and the declaration was held to be insufficient. WILLES, J., in his judgment said:

"The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover secundum allegata et probata. What is it that a declaration of this sort should state in order to fulfil

(1) 109 J.P. 72; [1945] 1 All E.R. 135.

(2) 114 J.P. 214; [1950] 1 All E.R. 682; [1950] 2 K.B. 353.

(3) (1862), 7 H. & N. 736.

(4) (1866), L.R. 1 C.P. 274; *affd.* Ex. Ch., (1867), 31 J.P. 390; L.R. 2 C.P. 311.

(5) (1856), 1 H. & N. 247.

(6) (1867), L.R. 2 C.P. 371.

those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to show that the defendant has been guilty of negligence, without showing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that the defendants were possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether upon the business or for the profit of the defendants or not, to pass over the land; and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings, and so met their deaths. The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. That is the whole sum and substance of these declarations."

Then he said:

"Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shown. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shown, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or do any act which may place them in danger. It may be, as in *Corby v. Hill* (1), that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way: but I cannot conceive that he could incur any responsibility merely by reason of his allowing the way to be out of repair."

KEATING, J., was of the same opinion.

WILLES, J., in his judgment in *Gautret v. Egerton. Jones v. Egerton* (2)

(1) (1858), 22 J.P. 386; 4 C.B.N.S. 556.

(2) (1867) L.R. 2 C.P. 371.

and also in the earlier judgment delivered by him on behalf of the court in *Indermaur v. Dames* (1) was plainly using "the subjective test" and considered that it was necessary to apply "the subjective test". But that is not the end of the inquiry, because, since those judgments were given, there have been a number of cases in the House of Lords and the Court of Appeal on the subject of the liability of a licensor to a licensee, and these will have to be considered carefully.

The decision of the House of Lords in *Cooke v. Midland Great Western Ry. of Ireland* (2) gave rise to discussion and was authoritatively interpreted as based on findings or inferences that the children had access to the turntable with the leave and licence of the railway company, and that the turntable was a trap for the children: *Latham v. R. Johnson & Nephew, Ltd.* (3) (77 J.P. 140, 141, per HAMILTON, L.J.); *Glasgow Corp'n. v. Taylor* (4) (86 J.P. 90, per LORD BUCKMASTER; per LORD ATKINSON (ibid., 91); per LORD SHAW (ibid., 93); *R. Addie & Sons (Collieries), Ltd. v. Dumbreck* (5) ([1929] A.C. 366, per LORD HAILSHAM, L.C.). The finding or inference of leave and licence will be found in the report of *Cooke's* case (2) per LORD MACNAGHTEN ([1909] A.C. 236); per LORD ATKINSON (ibid., 240); per LORD COLLINS (ibid., 241)), where the word "invitation" is evidently not used in the technical sense of a common business interest but rather as meaning a licence coupled with allurement. The important feature of *Cooke's* case (2), for the present purpose of ascertaining what degree or kind of knowledge of the danger must be shown to have been possessed by the licensor, is that LORD MACNAGHTEN (ibid., 234), LORD ATKINSON (ibid., 238) and LORD COLLINS (ibid., 241) applied what I am calling "the objective test" as part of the reasoning leading to the conclusion in favour of the appellant. LORD MACNAGHTEN said:

"The question for the consideration of the jury may, I think, be stated thus: Would not a private individual of common sense and ordinary intelligence, placed in the position in which the company were placed, and possessing the knowledge which must be attributed to them, have seen that there was a likelihood of some injury happening to children resorting to the place and playing with the turntable, and would he not have thought it his plain duty either to put a stop to the practice altogether, or at least to take ordinary precautions to prevent such an accident as that which occurred?"

It will be seen that the test applied there is to consider whether a private individual of common sense and ordinary intelligence, placed in the company's position and possessing that knowledge which must be attributable to the company, would have seen the likelihood of injury. Then LORD ATKINSON said:

"The right may be only the restricted right of a bare licensee, or it may be the more extended right of a person invited. The principle that the owner of land upon which a licensee enters on his own business, or for his own amusement, is only responsible for injuries caused to the latter by hidden dangers of which the former knew, but of which the licensee was ignorant and could not by reasonable care and observation have detected, must, in any given case, be applied with a reasonable regard

(1) (1866), L.R. 1 C.P. 274; *aff'd.* Ex. Ch., (1867), 31 J.P. 390; L.R. 2 C.P. 311.

(2) [1909] A.C. 229.

(3) 77 J.P. 137; [1913] 1 K.B. 398.

(4) 86 J.P. 89; [1922] 1 A.C. 44.

(5) [1929] A.C. 358.



to the physical powers and mental faculties which the owner, at the time he gave the licence, knew, or ought to have known, the licensee possessed. To the blind the most obvious danger may be a trap. To the idiotic the most perilous act may appear safe and cautious. The duty the owner of premises owes to the persons to whom he gives permission to enter upon them must, it would appear to me, be measured by his knowledge, actual or imputed, of the habits, capacities, and propensities of those persons."

LORD COLLINS said:

"I think there was evidence that the turntable, fastened as it was only by a bolt so easily withdrawn, was a dangerous thing for young children to play with, and that the defendants, as reasonable men, ought to have known it . . ."

It seems to me, therefore, that *Cooke's* case (1) includes a decision of the House of Lords in favour of "the objective test", in a case where there was a licence and a trap for children.

Next, there is a passage in the judgment of HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (2) reading as follows:

"Two other terms must be alluded to—a 'trap' and 'attraction' or 'allurement'. A trap is a figure of speech, not a formula. It involves the idea of concealment and surprise—of an appearance of safety under circumstances cloaking a reality of danger. Owners and occupiers alike expose licensees and visitors to traps on their premises at their peril, but a trap is a relative term. In the case of an infant there are moral as well as physical traps. There may accordingly be a duty towards infants not merely not to dig pitfalls for them, but not to lead them into temptation. 'Allurements', too, is a vague word. It may refer only to the circumstances under which the injured child has entered the close. Here it is hard to see how infantile temptations can give rights, however much they may excuse peccadilloes. A child will be a trespasser still, if he goes on private ground without leave or right, however natural it may have been for him to do so. On the other hand, the allurement may arise after he has entered with leave or as of right. Then the presence in a place where he frequently is of some object of attraction, tempting him to meddle where he ought to abstain, may well constitute a trap, and in the case of a child too young to be capable of contributory negligence it may impose full liability on the owner or occupier, if he ought, as a reasonable man, to have anticipated the presence of the child and the attractiveness and peril of the object."

The last sentence of that passage, referring to the standard of the reasonable man, was expressly cited with approval in *Glasgow Corpn. v. Taylor* (3) (86 J.P. 90, per LORD BUCKMASTER and per LORD SHAW OF DUNFERMLINE (*ibid.*, 93)). There is also, in the speech of LORD SHAW, the sentence:

"Where the dangers are not familiar and obvious, and where in particular they are or ought to be known to the municipality or owner, special considerations arise."

In *R. Addie & Sons (Collieries), Ltd. v. Dumbreck* (4) LORD HAILSHAM, L.C., referred to the judgment of HAMILTON, L.J., in *Latham v. R. Johnson & Nephew, Ltd.* (2) as "a judgment with which I find myself in full agreement".

(1) [1909] A.C. 229.

(2) 77 J.P. 137; [1913] 1 K.B. 398.

(3) 86 J.P. 89; [1922] 1 A.C. 44.

(4) [1929] A.C. 358.

It thus appears that in the case of a child licensee the "objective test" is to be applied in deciding whether the licensor had knowledge of the danger. Is there any reason for applying a different test in the case of an adult licensee? There are possible differences between a child licensee and an adult licensee with regard to the inference of leave and licence, the existence of a trap, and the sufficiency of the warning. But I cannot see any reason why any different test should be applied in deciding whether the licensor had knowledge of the danger. Moreover, there is at least some indication of the "objective test" applying to the case of an adult licensee in the passage which I have already cited from LORD SUMNER's speech in *Mersey Docks & Harbour Board v. Procter* (1), containing the words:

"As usual in cases of duties of care, the reasonable man is the standard on both sides. The licensor must act with reasonable diligence to prevent his premises from misleading or entrapping a licensee, who on his side uses reasonable judgment and conduct under circumstances that can be reasonably foreseen."

In *Fairman v. Perpetual Investment Building Society* (2), LORD ATKINSON (87 J.P. 23, 24), and LORD WRENBURY (*ibid.*, 26), said that a licensor is liable in respect of dangers of which he knew or ought to have known. In *Sutcliffe v. Clients Investment Co.* (3), in the Court of Appeal, it was said that the words "or ought to have known" in the above-mentioned passages from the speeches in *Fairman's* case (2) should be regarded as inserted *per incuriam*. In *R. Addie & Sons (Collieries), Ltd. v. Dumbreck* (4) LORD HAILSHAM, L.C., said ([1929] A.C. 365) that a licensor is liable in respect of dangers of which he knew or ought to have known. But the Court of Appeal again said in several cases that the words "or ought to have known" were inserted *per incuriam*: *Coates v. Rawtenstall Borough Council* (5) (101 J.P. 487); *Ellis v. Fulham Borough Council* (6) (101 J.P. 471); *Haseldine v. Daw & Son, Ltd.* (7) ([1941] 3 All E.R. 181); *Sutton v. Bootle Corp.* (8) (111 J.P. 85).

With regard to this apparent conflict of opinions, LORD GREENE, M.R., said in *Baker v. Bethnal Green Borough Council* (9):

"Mr Paull put forward what I must confess at first sight appears to me to be a very attractive explanation of that difficulty. What he said was, if I may put it in my own language, that if a licensor knows of the existence of what in fact is a trap or a hidden danger that is sufficient, because he cannot be heard to say that, although he knew the physical facts which constituted the danger from a purely objective point of view, the fact that it was a danger did not occur to his mind. In other words, that when the phrase 'or ought to be known' was used it was directed to that view of the position, and refers not to the physical objective facts, but to the circumstances that those facts constitute a danger. As I have said, that appears to me at first sight to be a very attractive view, but much though I should like to do so, I do not find it necessary to consider whether it is correct or not. It would, I think, be necessary to explore with some care the earlier authorities on the

(1) [1923] A.C. 253.

(2) 87 J.P. 21; [1923] A.C. 74

(3) [1924] 2 K.B. 746.

(4) [1929] A.C. 358.

(5) 101 J.P. 483; [1937] 3 All E.R. 602.

(6) 101 J.P. 469; [1937] 3 All E.R. 454; [1938] 1 K.B. 212.

(7) [1941] 3 All E.R. 156; [1941] 2 K.B. 343.

(8) 111 J.P. 81; [1947] 1 All E.R. 92; [1947] K.B. 359.

(9) 109 J.P. 72; [1945] 1 All E.R. 135.

subject of licensor and licensee before accepting it. I am prepared to deal with this case on the hypothesis that to fix a licensor with liability it is necessary to bring home to him not merely knowledge of the facts which constitute the danger, but his own knowledge that those facts do constitute a danger."

In *Pearson v. Lambeth Borough Council* (1) (in the Court of Appeal), the question was again discussed (114 J.P. 214-217) and left undecided. I should, of course, have been glad if it had been possible still to leave it undecided in this case, in view of the conflict of opinions which has been revealed by the examination of the previously decided cases. But for the purposes of the present case a decision on this question cannot be avoided. Having regard to the findings of fact which have been set out above, my conclusion, from examination of the previous cases, is that there is sufficient House of Lords authority in favour of "the objective test" to justify and require its application here. The licensor is not liable if, through lack of adequate inspection, he has failed to ascertain the existence of the physical facts which constitute the danger. But if the licensor does know of the physical facts which constitute the danger, and a reasonable man, having that knowledge, would appreciate the risk involved, the licensor is not excused by his own failure to appreciate the risk involved.

Applying that principle here, on the findings of fact which I have set out above, I hold that the plaintiff is entitled to succeed against the defendants for the agreed sum of damages, which is £1,000, and there will be judgment for the plaintiff for that sum.

*Judgment for the plaintiff.*

Solicitors: *Speechly, Mumford & Craig* (for the plaintiff); *William Charles Crocker* (for the defendants). G.A.K.

(1) 114 J.P. 214; [1950] 1 All E.R. 682; [1950] 2 K.B. 353.

## COURT OF CRIMINAL APPEAL

(HALLETT, STREATFEILD AND DONOVAN, JJ.)

June 16, 1953

REG. v. YINDRICH

*Criminal Law—Appeal—Question of law—Desirability of certificate from trial judge—Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 3 (a)—Criminal Justice Act, 1948 (11 & 12 Geo. 6, c. 58), s. 38 (2) (a).*

Where on a conviction the trial judge is of opinion that there is a point of law proper to be investigated by the Court of Criminal Appeal, it is desirable that he should grant a certificate that the case is fit for appeal, despite the fact that under s. 3 (a) of the Criminal Appeal Act, 1907, the convicted person has a right of appeal without leave on a ground involving a question of law alone. A certificate is of advantage to an appellant inasmuch as, under s. 38 (2) (a) of the Criminal Justice Act, 1948, if it is granted, his sentence, if the appeal is dismissed, will run from the date of conviction, whereas otherwise it will run from that date only if the Court of Criminal Appeal so directs.

**APPEAL against conviction.**

The appellant, Winifred Mary Yindrich, was convicted before the chairman at the West Kent Quarter Sessions on May 11, 1953, of embezzlement, and was sentenced to four months' imprisonment.

*Sir Frank Soskice, Q.C., and Wigoder* for the appellant.

*D. A. Hollis* for the Crown.

**HALLETT, J.**, having delivered the judgment of the court allowing the appeal, said: There is one more matter to which I ought to draw attention. The learned chairman intimated that he was prepared to give a certificate that this was a fit case for appeal, but he did not do so as a certificate is not necessary where, as here, the ground of appeal involves a question of law alone. He has reported to this court to the same effect—that he was prepared, if necessary, to grant the certificate. There is a matter of procedure which we think has, perhaps, been overlooked. It is true that under s. 3 (a) of the Criminal Appeal Act, 1907, a person convicted on indictment may appeal to the Court of Criminal Appeal against his conviction without a certificate on any ground of appeal which involves a question of law alone, but, none the less, we desire to point out that, if the court of trial thinks that the point indicated is such that it would be right for it to be investigated here, a certificate should be granted although under s. 3 (a) an appeal may be possible without it. The reason is that under s. 38 (2) (a) of the Criminal Justice Act, 1948, in the event of the appeal being dismissed, if there is no certificate the sentence will only run from the date of conviction if the court so directs, whereas, if a certificate is given by the learned judge, recorder, or chairman, as the case may be, time will run from conviction without the court so directing. Therefore, the existence of a certificate is a very substantial advantage to the appellant as regards the length of sentence which he has to serve.

*Appeal allowed.*

Solicitors: *Humphrey Razzall & Co.* (for the appellant); *Solicitor, Metropolitan Police* (for the Crown).

T.R.F.B.

## MANCHESTER ASSIZES

BARRY, J.

March 20, 23, 24, 28, 1953

### HARTLEY v. MAYOH AND CO. AND ANOTHER

*Negligence—Fire—Fireman electrocuted—Liability of occupiers—Invitee—Mains supply of electricity to lighting circuit not cut off—Obsolete type of mechanism—Unusual danger.*

*Factory—Fire—Fireman electrocuted while fighting fire—"Persons employed"—Electricity (Factories Act) Special Regulations, 1908 and 1944 (S.R. & O., 1908, No. 1312, as amended by S.R. & O., 1944, No. 739), definitions.*

*Electricity Supply—Faulty installation—Fireman electrocuted—Liability of electricity board—Failure to test circuit—Negligence—Breach of statutory duty—Electricity Supply Regulations, 1937, reg. 25 (a).*

The second defendants were the authority responsible for the supply of electricity to a factory occupied by the first defendants. On Sept. 24, 1950, a fire broke out at the factory and the fire brigade were summoned. As soon as they arrived, the deceased, an officer in the brigade, asked the first defendants' manager where the electric switches were so that he could cut off the mains supply of electricity. He was directed to a main switchboard on the ground floor, and, in his presence, another fireman knocked off the handles of two ironclad switches, contained in boxes adjoining the switchboard, which were obviously mains switches. They all thought that the whole supply of electricity to the premises was then cut off, as the manager did not know, and the firemen did not realise, that the lighting circuit was controlled by two old-fashioned tumbler switches, situated near the main switchboard, and unconnected by any form of link-bar. Notwithstanding



that these tumbler switches were not turned off, no current should have been flowing through the lighting wires on the upper floor of the premises, where the fire was blazing, as the master switch which controlled the lighting circuit on the upper floor was turned off, but the polarity of the lighting system had been reversed by the crossing of the two leads between the tumbler switches and the meter and neutral bar, with the result that the neutral wire was alive throughout the whole circuit. When the deceased entered the room where the fire was, a live wire came into contact with his arm and he was electrocuted. The accident could not have occurred if the tumbler switches had been in the "off" position or if the leads had not been crossed. When, and by whom, they were originally crossed was not known. In January, 1950, the second defendants had fitted a new meter, but had not tested the circuits. The widow of the deceased claimed damages against the first and second defendants in respect of his death, the claim against the second defendants being based mainly on their failure to test the circuits in January, 1950. By their defence the second defendants pleaded that the accident was caused, either wholly or in part, by the negligence of the deceased or of some other officer of the fire brigade.

**HELD:** (i) although a fireman should understand the usual and normal methods of cutting off the electricity supply in premises in which a fire had taken place, he was not required to possess a detailed knowledge of obsolete mechanism which might, at some period, have been installed for this purpose in buildings within his area; in the circumstances the deceased was justified in concluding that the operation of the two modern ironclad switches cut off the whole of the electricity supply to the premises; and neither he nor any other member of the fire brigade was to blame for the accident.

(ii) the status of the deceased on the premises was that, or equivalent to that, of an invitee; a fireman attained this status whether his brigade had been summoned to the fire by the occupiers of the premises or by some other person.

*Merrington v. Ironbridge Metal Works, Ltd.* (1952) (117 J.P. 23), followed.

(iii) the first defendants should have been aware of the way in which the mains supply to the lighting and power circuits could be switched off; the fact that the lighting supply was controlled by a switch which, in the absence of a link-bar between the two tumbler switches, did not appear to be a mains switch, and that electric current could circulate through the circuit when the only switches which appeared to be mains switches were turned off, constituted an unusual danger to persons in the situation of the deceased, against which such persons ought to have been warned; and, therefore, the first defendants, as the occupiers of the premises, had failed in their duty to the deceased, as an invitee, to give him due warning of an unusual danger of which they ought to have been aware, and they were liable in damages for negligence.

(iv) on the facts, the first defendants had failed to comply with the requirements of the Electricity (Factories Act) Special Regulations, 1908 and 1944, reg. 1, reg. 7 and reg. 9; their liability to persons injured by a breach of the regulations was not confined to persons in their own employment, notwithstanding that "danger" was defined in the regulations as meaning danger of various kinds "to persons employed"; the reference to persons employed was merely part of that definition, and, once the definition was fulfilled (i.e., once a breach of the regulations caused danger to "persons employed" on the premises), other persons lawfully on the premises were afforded the right of protection; alternatively, the words "persons employed" were not confined to persons employed by the occupiers, but included all other employed persons on the premises; and, therefore, the first defendants were in breach of their statutory duty to the deceased.

(v) when the second defendants installed the new meter on the first defendants' premises in January, 1950, they should have realised that the first defendants would assume that the mains supply was properly connected to the phase wire and not to the neutral wire of the lighting circuit; no intermediate examination by the first defendants could be reasonably contemplated and, in the absence of any such examination, the second defendants should have been aware that their omission to make a proper test would be likely to cause damage to any persons lawfully on the premises who had occasion to come into contact with any part of the wiring of the lighting system; and, therefore, the failure of the second defendants to test the circuits in January, 1950, was a negligent omission on their part and constituted a breach of the legal duty which they owed to the deceased.

*M'Alister (or Donoghue) v. Stevenson* ([1932] A.C. 562), applied.

Semble, that the second defendants were also in breach of the Electricity Supply Regulations, 1937, reg. 25 (a).

(vi) the fault of the first defendants being comparatively venial, the liability for the damages awarded to the widow should be borne, as to ten per cent. by the first defendants, and as to ninety per cent. by the second defendants.

**ACTION for damages for negligence and breach of statutory duty.**

The plaintiff, Mrs. Doris Hartley, was the widow and administratrix of Reginald Dingle Hartley, a divisional officer of the Salford Fire Brigade, who died through electrocution on Sept. 24, 1950, when he was engaged in extinguishing a fire at a factory occupied by the first defendants, Mayoh and Co. The second defendants, the North-Western Electricity Board, were the authority responsible for the supply of electricity to the factory. The plaintiff claimed damages against the defendants under the Fatal Accidents Act, 1846, and the Law Reform (Miscellaneous Provisions) Act, 1934, in respect of the death of her husband.

The deceased was the officer responsible for ensuring that the mains supply of electricity and gas was cut off from any building at which the fire brigade were called on to work. On Sept. 24, 1950, the brigade were summoned to deal with a fire which had broken out on the upper floor of the first defendants' factory, and, as soon as they arrived, the deceased and another fireman, named Bigland, asked the first defendants' manager where the main electric switches were situated and were directed by him to the main switchboard on the ground floor. By this switchboard were two ironclad switches contained in boxes, both being obviously mains switches. Bigland, in the presence of the deceased, knocked off the handles in both these switchboxes and they all thought that the whole of the electricity supply to the premises was then cut off. The lighting circuit, however, was controlled by two small tumbler switches, unconnected by any form of link-bar, which were situated on one side of the main switchboard. These tumbler switches were not turned off, as neither the manager nor the firemen realised their function. The master switch, which controlled the whole of the lighting circuit on the upper floor of the premises, and the switch controlling the lighting in the room in which the fire was blazing were both turned off, but, owing to the fact that the leads between the tumbler switches and the meter, on the one hand, and the neutral bar, on the other hand, were wrongly crossed, the polarity of the lighting system was reversed, the current passed through the neutral wire instead of through the phase wire, and the neutral wire remained charged with electricity even after the master switches were off. Having received a slight shock from an electric wire in the neighbourhood of the fire, Bigland returned to the switchboard with the first defendants' manager, who assured him that there were no other switches on the circuit. After re-examining the switchboard, the manager assured Bigland that all the switches were off. Shortly afterwards the deceased entered the room in which the fire was blazing, a "live" electric wire came into contact with his forearm, and he was killed. The plaintiff based her claim against each of the defendants on negligence at common law and breach of statutory duty.

*Brabin, Q.C., and P. Curtis for the plaintiff.*

*Laski, Q.C., and T. M. Backhouse for the first defendants, Mayoh and Co.*

*Nelson, Q.C., and C. M. W. Elliott for the second defendants, the North-Western Electricity Board.*

*Cur. adv. vult.*

March 28. **BARRY, J.**, read a judgment in which he stated the facts and said: This accident, I think, could never have happened if the tumbler switches had been in the "off" position, nor could it have occurred if the

current had been flowing, as it should have done, through the phase wire, which was controlled by the master switch and the switch controlling the lighting in the room where the fire was blazing, and not through the neutral wire. Before considering the liability, if any, attributable to the two defendants, or either of them, it will be convenient to deal with the plea raised by the second defendants that the accident was caused, either wholly or in part, by the negligence of the deceased himself or of some other officer of the Salford Fire Brigade. For this purpose I will assume that firemen should have some general knowledge of gas, electric and water installations, and, in particular, they should, I think, understand the normal and usual methods of cutting off the gas and electricity supply in premises in which a fire takes place. In my judgment, however, they are not required to possess a detailed, historical knowledge of obsolete and highly unusual pieces of mechanism which may at some period have been installed for these purposes in buildings within their area. In the circumstances of this case I am satisfied that, in the absence of any information to the contrary, both Sub-Officer Bigland and the deceased were justified in concluding that the operation of the two modern ironclad switches cut off the whole of the electricity supply to the building. It would, I think, be grossly unjust to convict them of negligence because they failed to realise during the progress of a fire that the two old, unconnected tumbler switches might control the mains supply to the lighting circuit. After all, both the deceased and Bigland were there to fight the fire and not to make a detailed examination into the wiring system of the switchboard. I accept the evidence of the many witnesses who told me that without such a detailed investigation any ordinary fireman would assume that two unconnected tumbler switches controlled some local lighting point and not the mains supply. The use of tumbler switches for controlling the mains supply, even when connected by a link-bar, was a wholly obsolete practice. Since 1930 the second defendants, or their predecessors, had been advising the owners of old installations to change over to modern ironclad switches of the interlocking type. Despite this fact, I have little doubt that, if the two tumbler switches had been connected by a link-bar, the deceased and Bigland would have turned them off, as they would have suspected, at least, that these two connected switches might have some connection with the mains supply. In the absence of any form of linkage joining the two, these two tumbler switches were almost, if not quite, unique as a device for cutting off the mains. Having exonerated, as I do, the deceased and other members of the fire brigade from any blame, I must now consider the legal position of the two defendants.

The first defendants were the occupiers of the premises in which the accident occurred and their common law and statutory obligations to the deceased have both got to be taken into account. At common law, the first defendants' duties to the deceased depended on the capacity in which the deceased entered on their premises. I am satisfied that the status of the deceased on the premises was that—or was, at least, equivalent to that—of an invitee. In reaching this conclusion I respectfully follow, and agree with, the decision of HALLETT, J., in *Merrington v. Ironbridge Metal Works, Ltd.* (1). I also share that learned judge's opinion that a fireman attains this status whether his brigade has been summoned to the fire by the occupiers of the premises or by some outside person who happens to observe that a fire has broken out.

Stated at its very lowest, the duty of an occupier of premises to his invitee is to use proper care to ensure that his premises are free from any unusual

(1) 117 J.P. 23; [1952] 2 All E.R. 1101.

danger, or, alternatively, to give due warning of any unusual danger of which he knows or ought to know. With this standard in mind I am quite satisfied that the first defendants failed to fulfil their common law duties towards the deceased. It is, however, right to say that I acquit them of any conscious default. I am also far from satisfied that they ought to have known that the polarity of the lighting system had been reversed by the crossing of the leads between the tumbler switches and the meter and neutral phase. On the other hand, I consider that the occupiers of premises of this kind ought to have been aware of the way in which the mains supply to the lighting and power circuits could be switched off. I am fortified in this view by the evidence of Mr. Holland, the first defendants' manager. He told me that he knew that the two tumbler switches did not control any local lighting points. This should, I think, have put him on inquiry as to their true function. Neither Mr. Holland nor anyone else in the employment of the first defendants warned the deceased of the unusual danger which existed in these premises for firemen or other persons who might come into contact with the electric wires, this unusual danger being, of course, the fact that the lighting supply was controlled by a switch which did not appear to be a mains switch and that electric current could circulate through the electric circuit when the only two switches which appeared to be mains switches were turned to the "off" position. Put in another way, the first defendants ought, I think, to have realised that the absence of any link-bar between the two tumbler switches constituted an unusual danger to persons in the situation of the deceased, against which such persons clearly ought to have been warned. If no warning was to be given, the first defendants should have fulfilled their alternative duty, i.e., they should have rendered their premises safe and eliminated this unusual danger by the simple means of fitting a link-bar between the two tumbler switches or fixing some label or notice in the neighbourhood of the switches indicating that they controlled the main lighting supply to the building.

The plaintiff's case against the first defendants is also founded on a breach of their statutory duties under the Regulations for the Generation, Transformation, Distribution and Use of Electrical Energy in Premises under the Factory and Workshop Acts, 1901 and 1907, 1908 (S.R. & O., 1908, No. 1312), which are still in force.\* If these regulations are, in truth, designed to afford protection to those employed in a factory other than the direct employees of the occupiers of that factory, the plaintiff's cause of action under the regulations is not, and, indeed, could not be, in dispute. The occupier of the factory is responsible for compliance with the regulations, and a substantial number of them have, clearly, been infringed in the present case, including reg. 1, reg. 7 and reg. 9, which are specifically referred to in the pleadings. Counsel for the first defendants, however, contended that the regulations afforded protection only to the direct employees of the occupier of the factory. In support of this argument he drew attention to the fact that in the regulations the word "danger" is defined as meaning danger of various kinds "to persons employed." He contrasted the phrase "persons employed" with the more general words used in certain sections of the Factories Act, 1937—e.g., s. 12 (3), s. 13 (1), s. 14 (1) and s. 23—which more general words, he said, were used by the legislature when it was intended to extend the protection of the Act to persons working on premises who were not, in fact, employed by the occupiers. This is a formidable argument, but, with

\* These regulations were amended by the Electricity (Factories Act) Special Regulations, 1944 (S.R. & O., 1944, No. 739), and the two sets of regulations may be cited together as the Electricity (Factories Act) Special Regulations, 1908 and 1944.



some hesitation, I think that it ought to be rejected. The regulations of 1908 are quite general in their terms, although it is true they are made under powers contained in the Factory and Workshop Acts. It would, I think, be a strange course of construction to limit the application of any code of regulations by reason of the definition of a single word which is only to be found in a proportion, and not a large proportion, of the regulations concerned. This is particularly so when the word in question has not, in itself, any conceivable bearing on the extent of the application of the regulations. It would, of course, be absurd to find that those regulations which contained the word "danger" were of narrower application than those in which that word did not appear. Having regard to the scope, and, particularly, to the purpose, of these regulations and the danger which they were designed to prevent, I think that I should give them the most liberal interpretation which their wording will allow. This can be done by regarding the reference to "persons employed", in the definition of "danger", as merely part of that definition, and by so doing one can construe the regulations as meaning that, once this definition has been fulfilled—i.e., once some act or omission causes danger to "persons employed" on the premises—other persons lawfully on those premises are afforded the right of protection. Alternatively, and, to my mind, perhaps more attractively, it can be said that the words "persons employed" should not be given a more limited meaning than the words actually express, and it can be said that these words are not confined to persons employed by the occupiers but can also include all other persons who are employed on the premises. On the whole, therefore, I think that the plaintiff has established her case against the first defendants under the regulations of 1908, but I reach that conclusion with very much less confidence than I reached the conclusion that she has established against them a breach of their common law duties.

The liability of the first defendants having thus been established, I must now consider the position of the second defendants, the North-Western Electricity Board. For the sake of brevity, I shall not differentiate between the board and their predecessors prior to 1948 when the board took over the undertaking from the Salford Corporation and other authorities. I am satisfied that, when an electricity supply was first brought to these premises, the occupiers were responsible for supplying the cables, or leads, or lengths of wire, of sufficient length to enable the installation on the premises to be attached on the meter and neutral bar provided by the second defendants. The subsequent attachment of the leads provided by the occupiers, and their subsequent sealing within the meter and the neutral bar, were within the responsibility of the second defendants. [HIS LORDSHIP reviewed the evidence which showed that the original installation had been interfered with on four occasions. On the first occasion the number of lighting points had been increased, the work being done by independent contractors employed by the first defendants. On the other three occasions the work had been done by the second defendants: in 1934 they had supplied a new meter, in 1946 they had installed a bottle-washing machine, and in January, 1950, after a burst pipe had flooded the switchboard, they had put in a new three-terminal meter and connected it up to the lighting circuit. The work of putting in the new meter was carried out by Mr. Oddy, a meter-fixer employed by the second defendants. HIS LORDSHIP was satisfied that Mr. Oddy was not responsible for crossing the wires, as, to carry out his work, he would only have disconnected the leads between the meter and the switches, and the leads were of such lengths that it was impossible to interchange them at the ends where they were connected

with the second defendants' apparatus. HIS LORDSHIP continued:] I am, however, forced to the conclusion that, on a strong balance of probability, the original crossing of the two leads from the tumbler switches to the second defendants' apparatus was the fault of some unknown employee of the second defendants. This fault was committed on some previous occasion which it is wholly impossible to identify. The original responsibility for the crossing of these two leads is, however, a question, I think, of, comparatively, slight importance. The plaintiff's case against the second defendants is primarily based on their failure to test the circuits when they fitted the new meter in January, 1950—about eight months before this accident took place. The fact that the current was passing through the neutral instead of the phase wire could have been ascertained by more than one very simple test, the simplest of which was, perhaps, the use of a neon testing instrument, which would have detected this fault in a matter of seconds. There has been a considerable body of expert evidence to the effect that a test of this kind should be made by a supply authority whenever there has been any interference with the mains supply, such as by the fixing of a new meter. It was the normal practice of some boards to make such a test, although it was not, at that time at least, the practice of the second defendants. The failure of the second defendants to make any test on this occasion was, I think, a negligent omission on their part. The second defendants pointed out that Mr. Oddy himself could not have crossed the wires and was, therefore, entitled to assume that they were correctly connected. After fixing a meter and re-establishing a mains electricity supply on the premises, the second defendants, realising the extreme danger which may arise from any fault, should not, I think, have been satisfied with a probability—or even a high probability—that the circuits were correctly connected. I think that they should have satisfied themselves, as they so easily could have done, that they were, in truth and in fact, correctly connected.

It does not, however, assist the plaintiff to establish that the second defendants were what has been described as "negligent in the air". She must also satisfy me that they were in breach of some legal duty which they owed to the deceased. I have little doubt that such a duty did, in fact, exist. The plaintiff relied on the well-known principles enunciated by the House of Lords in *M'Alister (or Donoghue) v. Stevenson* (1): see the observations of LORD ATKIN ([1932] A.C. 580). I am satisfied that those principles are applicable in the present case. In 1953 it is unnecessary for me to cite any passages from the well-known speeches so often referred to in that case. The second defendants should, I think, have realised that, when they installed a new meter which measured the electric current passing into the lighting system of the occupiers of any premises, these occupiers would assume that the mains supply was properly connected to the phase wire and not to the neutral wire of their lighting circuit. No intermediate examination by the occupiers could, I think, be reasonably contemplated, and in the absence of any such examination the second defendants should, in my judgment, have been aware that their omission to make a proper test of the circuit would be likely to cause damage to any persons lawfully on the occupiers' premises who had occasion to come into contact with any part of the wiring of the lighting system. Such persons, in my judgment, included the deceased. No useful purpose would, I think, be served by a further elaboration of this part of the case.

The plaintiff further relied, as against the second defendants, on a breach by them of the Electricity Supply Regulations, 1937, made by the Electricity

(1) [1932] A.C. 562.

Commissioners under the Electricity (Supply) Acts, 1882 to 1936. Here, again, I think that the plaintiff's case under these regulations is very much less secure than it is under the common law of this country. None the less, I ought to express an opinion about the matter, but again do so with some considerable hesitation. On the whole, I take the view that the plaintiff has established a breach of reg. 25 (a) of the regulations of 1937. Regulation 25 reads:

"(a) The undertakers shall be responsible for all electric lines and apparatus placed by them on the premises of a consumer and either belonging to the undertakers or under their control (whether forming the whole or part of the consumer's installation or not) being installed and maintained in a safe condition and suitable for their respective purposes and being so fixed and protected as to prevent so far as is reasonably practicable leakage to any adjacent metal. (b) The standard of construction and installation adopted by the undertakers in complying with para. (a) hereof in so far as it relates to the whole or any part of a consumer's installation shall not be lower than that which the undertakers would be prepared to accept under reg. 27 to reg. 30 (inclusive)."

The matter seems to me to be extremely doubtful, but although the two leads from the tumbler switches were originally, as I have found, provided by the occupiers of the premises, none the less, in one sense, they were placed by the undertakers on the premises—in the sense that the undertakers utilised these wires and wholly controlled them for the purpose of connection with their apparatus, i.e., the meter and the neutral phase on the switchboard. I think that is a possible construction of the matter, and, although I am extremely doubtful about it, I think, on the whole, were I forced to decide this matter, I should find in favour of the plaintiff. Clearly, if the regulations are applicable to these two leads there has been a breach of the requirements placed on the undertakers—in this case, the second defendants—as those two leads were certainly not installed or maintained in a safe condition.

In the result, I find that each of the defendants are responsible to the plaintiff in respect of this accident, each being responsible for one of the two causes in the absence of which no accident could have occurred. I have, therefore, to turn to the question of damages.

I have been asked by counsel for the first defendants to apportion the blame for this accident between the defendants. I have considered the matter carefully, and I have no doubt that by far the greater responsibility in this matter rests on the second defendants. The first defendants are pickle manufacturers and they are not experts in electrical supply. Their fault—although it was a fault, as I have found—was, I think, a comparatively venial one, and I think that the fair apportionment as between the defendants should be that the first defendants bear ten per cent. of the loss and the second defendants bear the remaining ninety per cent. of the loss. By "loss" I mean the damages awarded to the plaintiff.

*Judgment for the plaintiff against both defendants.*

Solicitors: *George Davies*, Manchester (for the plaintiff); *Shaw, Smith & Co.*, Manchester (for the first defendants); *James Chapman & Co.*, Manchester (for the second defendants).

G.F.L.B.

# **PROBATE, DIVORCE AND ADMIRALTY DIVISION**

(LORD MERRIMAN, P., AND COLLINGWOOD, J.)

June 4, 5, 8, 1953

**FOSTER v. FOSTER**

*Divorce—Desertion—Constructive desertion—Conduct equivalent to expulsion of other spouse—Conduct falling short of cruelty.*

*Res Judicata—Husband and wife—Persistent cruelty—Dismissal of summons—Fresh summons on ground of constructive desertion.*

On Aug. 29, 1952, the wife issued a summons against the husband, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging him with persistent cruelty to her on divers occasions before and on Aug. 16. On Sept. 3 the summons was served on the husband. On Sept. 4 the wife left the matrimonial home. On Sept. 17 the justices dismissed the summons. On Oct. 24 the wife issued further summonses before a different court of summary jurisdiction charging the husband with desertion as from Sept. 4, and wilful neglect to maintain her. At the hearing on Nov. 16 she gave evidence similar to that which she had given in the earlier proceedings, but stated also, *inter alia*, that on or about Sept. 4 the husband had said that he had finished with her, and that on Aug. 28 he had hit her and she had left the house for the night. On Nov. 16 the justices made an order in favour of the wife.

**HELD:** since the issue decided on Sept. 17 was different from that before the justices on Nov. 16 the wife was not estopped *per rem judicatam* from giving evidence similar to that given in the first proceedings; further, although the wife could not on the same evidence make out a case of constructive desertion, she was entitled to give evidence of other acts justifying her leaving home; there was evidence of other acts from which the court could find that the husband's conduct, being of a different kind from and not merely less than cruelty, justified the wife in leaving the matrimonial home; and, therefore, the wife was entitled to an order.

Observations of BUCKNILL, L.J., in *Edwards v. Edwards* (1949) (113 J.P. 383), and of HODSON, L.J., in *Pike v. Pike* ([1953] 1 All E.R. 235), applied.

**APPEAL** by the husband against a maintenance order made by the justices for the petty sessional division of Sutton, Surrey, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, on the grounds of the husband's desertion and wilful neglect to provide reasonable maintenance for the wife.

The parties were married on Aug. 1, 1927. On Aug. 29, 1952, the wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, complaining that on Aug. 16, 1952, and on divers days prior thereto at the matrimonial home the husband had been guilty of persistent cruelty to her. On Sept. 3, 1952, the summons was served on the husband. On Sept. 4, 1952, the wife left the matrimonial home. At the hearing of that summons before the Dorking justices, the wife stated that the marriage had begun to break up at the beginning of the war; that during the preceding ten years the husband had illtreated her; that he had been associating with other women, particularly a Mrs. D.; that she, the wife, was suspicious of these associations; that she and the husband had quarrelled about them; and that these quarrels often ended by the husband hitting her on the mouth, causing her injury. The husband admitted that he had smacked his wife many times, and that on a date before the service of the summons there had been a "scene". On Sept. 17, 1952, the Dorking justices found that for the previous ten years the wife had been obsessed with the idea that the husband was having affairs with other women, and during the previous year or so had particularly accused him of having an affair with Mrs. D., and they found that there was no evidence that he was guilty of any improper association with Mrs. D. As regards the



physical violence, they found that the husband had smacked the wife from time to time when she had been nagging him about going out without her, but that the husband's conduct was not of such a character as to have caused danger to life, limb, or health, bodily or mental, or to give rise to a reasonable apprehension of such danger. Having seen and heard both parties in the witness box the justices were more impressed by the husband than by the wife, and, therefore, they dismissed the complaint, it not being considered that there was sufficient evidence of persistent cruelty to justify an order being made. On the same day the parties saw the probation officer with a view to a reconciliation, and the probation officer suggested that the wife should have three weeks in which to decide whether to return home. At no time did the wife announce her decision.

On Oct. 24, 1952, the wife issued summonses charging the husband with desertion as from Sept. 4, 1952, and wilful neglect to maintain her. Those summonses were heard by the Sutton justices on Nov. 16, 1952, when the wife gave evidence similar to that given before the Dorking justices, but added that the husband had said to her: "I would not take a thing like you out"; that, if she asked him to take her out, he flew into a rage and hit her; that, if she asked him, as she frequently did, not to take out Mrs. D., he hit her; and that a week before she left he hit her and threatened to "do her in"; that this phrase had been used more frequently recently and had frightened her; that when the husband could not have sexual intercourse he would hit her and say he would go out because he knew where he could "get it"; that on Aug. 28, 1952, there had been a quarrel over a conversation which the wife had had with Mrs. D., and as a result of the quarrel the husband had hit her, causing her injury, and she had spent the night with her sister; and that on Sept. 4, 1952, she had left because the husband said he had finished with her. Neighbours stated in evidence that on Aug. 28, 1952, they had heard the wife scream and had seen her running out of her house with blood on her face. The Sutton justices found that the husband's conduct caused her to leave the matrimonial home, and that he had deserted her and had wilfully neglected to maintain her. They, accordingly, made a maintenance order in the wife's favour and the husband appealed.

*D. E. Peck* for the husband.

*Boydell* for the wife.

**LORD MERRIMAN, P.**, stated the facts and continued: There is no escape from the dilemma that we are confronted with rival findings about substantially the same course of events, and that at Dorking, the husband's, and at Sutton, the wife's, evidence, has been preferred by those who had the advantage of seeing and hearing the witnesses. In those circumstances it is not easy to apply the directions to an appellate tribunal contained in *Watt (or Thomas) v. Thomas* (1). It is true that the charge at Dorking was persistent cruelty before and up to Aug. 16, whereas at Sutton it was desertion from Sept. 4, but the wife gave evidence at Dorking on Sept. 17 that things had got worse recently and that the husband had said to her: "I will do you in before I have finished with you", and that he had threatened to take her life within the previous two months, and that recently it had worried her a great deal and frightened her. Finally, she said that "matters came to a head at the end of August. I left home a fortnight ago tomorrow, on Sept. 4". From this it appears that the Dorking justices had before them the wife's whole story, at least in general terms, up to and including her alleged expulsion

(1) [1947] 1 All E.R. 582; [1947] A.C. 484.

from the matrimonial home on Sept. 4. As I have already indicated, it seems to me that there is no escape from the essential conflict between the findings of the two courts. I should have felt happier about this case if the Sutton justices had particularised the conduct which they found had caused the wife to leave home, and if there had appeared in the statement of their reasons any trace of their having appreciated the difficulties created by the decision at Dorking a few weeks before.

It is said on behalf of the husband that the wife was estopped per rem judicatam from making the charge of desertion at Sutton. I must not be taken to assume that it is literally accurate that her evidence was in every respect the same at Sutton as it was at Dorking, but the gravamen of the submission on behalf of the husband is that she is saying, as she alleged that she said to the probation officer, that she could not go back to her husband because of his cruelty, which, *ex hypothesi*, had been found not to exist as a justification.

With regard to the incident on Aug. 28, it is argued that if this was in the least serious, as part of the course of cruelty, it not only could have been, but ought to have been, included in the wife's complaint of Aug. 29, and, therefore, she should be estopped from relying on it now, but it is also argued that it cannot have been serious because, if it had been, the wife could not have overlooked it when she made her complaint on Aug. 29. Alternatively, it is said that there was no such incident, and that it was only a confused repetition of an incident of Aug. 16. Out of such evidence it was obviously difficult to spell out an estoppel. As regards the suggestion that there was no incident on Aug. 28, and that it is merely a confused repetition of the incident of Aug. 16, it is worthy of note that, although the wife gave no evidence in chief and called no witnesses about the incident of Aug. 28, the husband in cross-examination referred to an incident, which is admittedly identifiable with the incident corroborated at the Sutton hearing by the neighbours, and that is again identifiable as the incident of Aug. 28.

Alternatively, it is argued on behalf of the husband that, if this is not a case of estoppel, it is a case of which, reading from the headnote in *Pike v. Pike* (1), it can be said that

"A charge of constructive desertion cannot be proved by evidence of conduct, alleged to have caused the petitioner to leave the matrimonial home, of the nature of cruelty, but not amounting to cruelty in law."

The point in that case emerges clearly from one passage in Hodson, L.J.'s judgment:

"I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty. One has in mind the well-known case of *Russell v. Russell* (2), where false charges were made, persisted in, and not withdrawn, or, of course, one can take the simple case of constructive desertion where there is an order or direction by one spouse to the other to leave. If that order is obeyed and the direction is followed and not withdrawn, then, again, desertion may run."

(1) [1953] 1 All E.R. 232.

(2) [1895] P. 315; *affd.* H.L., 61 J.P. 771; [1897] A.C. 395.

We were also referred to *Edwards v. Edwards* (1), and, in particular, to a passage in the judgment of BUCKNILL, L.J., in which he commented on some observations of HODSON, J., in *Barker v. Barker* (2), an appeal heard in this court. BUCKNILL, L.J., said:

"Counsel for the husband says that is his case, and that in the present case, the commissioner having found that the husband was not cruel, there was no justification for the wife leaving. If HODSON, J., meant to say that, once a charge of cruelty has failed to be established, it is impossible for a wife to establish grounds justifying her in refusing to live with her husband, with great respect to the learned judge, it seems to me that that decision is inconsistent with the judgments in *Russell v. Russell* (3) and *Buchler v. Buchler* (4) which this court ought to follow. I myself think that that is not what the judge meant to say. I think he meant to say in effect: 'Here is a case where the blows inflicted by the husband on the wife either amounted to cruelty in that they injured her health, or were likely to injure it, or they were not of such a nature. If they were not of such a nature then, there being no other evidence in the case to justify desertion, the court ought not to say: "Although they were, in effect, trivial blows, they justify her in leaving the husband."'"

I emphasise the last sentence.

In a nutshell, therefore, the argument for the husband is that this is an attempt to build up a case of constructive desertion by what is really a case of unproved cruelty, and, more particularly, it is an attempt to say that smacks delivered from time to time by the husband, which have been held not to have been such as to amount to cruelty, justify the wife in leaving her husband. But I emphasise, as is apparent from the contexts of both those quotations, that the proposition depends on there being no other evidence in the case. Here it is said that there was other evidence, that is to say evidence of the husband having turned the wife out, in other words, of an order or direction by the husband to the wife to leave, acted on and not withdrawn. In her evidence-in-chief before the Sutton justices the wife said: "I left home on Sept. 4, 1952, because he said he had finished with me. He would not turn me out, but he would go out more". It is said, as the context is alleged to show, that this was all part of the incident of Aug. 28. I am not at all sure that that is so. The note at this part is by no means clear, and it may very well be that this, and an alleged threat to "do her in" of which she speaks, all occurred in what she calls "the week before I left", by which I presume she means the week before she left home. But then it is also said that the husband had withdrawn this direction to her to leave, if it was a direction to leave, at the interview with the probation officer on Sept. 17, and that the wife's failure to communicate her acceptance of that offer cancelled anything that had been said previously about her leaving. As regards the interview with the probation officer, if it was admissible at all, I do not think it can fairly be said to amount to any more than an undertaking by the wife to think it over. I do not think that the justices were bound to accept the evidence given by the husband that the wife was satisfied, and expressed herself to be satisfied, with his promise not to hit her again, which he said he had given after the issue of the first summons. The question still remains, therefore: Was there

(1) 113 J.P. 383; [1949] 2 All E.R. 145; [1950] P. 8.

(2) 113 J.P. 91; [1949] 1 All E.R. 247; [1949] P. 219.

(3) [1895] P. 315; *affd.* H.L., 61 J.P. 771; [1897] A.C. 395.

(4) 111 J.P. 179; [1947] 1 All E.R. 319; [1947] P. 25.

any evidence to justify a finding that the condition of things on Sept. 4 was such that the husband was expelling the wife from the home?

I will deal first with the allegation of estoppel. If the case before the Sutton justices had been an attempt to make a fresh charge of persistent cruelty by including in the course of conduct relied on an alleged incident of Aug. 28, the day before her complaint to the Dorking justices, I should be inclined to hold that she was estopped from re-opening that charge. Obviously, the mere fact that there was better and more detailed evidence, supported by independent witnesses of that incident, would be irrelevant. But at Dorking there was no charge of desertion on Sept. 4 before the court. It is true that, whether by amendment of the summons after she had left home or by the issue of a fresh summons returnable at the same time, all of which is a mere matter of machinery, a charge of desertion could have been made before the Dorking justices on Sept. 17, but, in my opinion, the wife was not bound to put the charge of desertion before the Dorking justices under the penalty of being estopped from afterwards alleging that she had been deserted before the date of that hearing. I think, perhaps, the matter can best be tested by supposing, for the sake of argument, that those steps had been taken, and that there had been before the justices at Dorking on Sept. 17 both a charge of cruelty up to Aug. 29 and a charge of desertion from Sept. 4. Would the Dorking justices, having found that the charge of cruelty had not been proved, have been bound to dismiss the charge of desertion because it was an attempt to build up a charge of constructive desertion by what was really a case of unproved cruelty? In my opinion, they would not, because of the evidence which, I am assuming for the purposes of the argument, the wife would have given, as she gave at Sutton, about the husband telling her that he had finished with her, and the rest. In other words, I am not prepared to hold that a court could not find that a husband who admittedly had smacked his wife in the face many times, because he said he was sick of being nagged by her about his going out, had neglected her, and "did not remember" having threatened her, as she alleged, but said that, if he did so, he did not mean it seriously, ought not to be taken to mean what he says, if he tells his wife at the end of it all that he had finished with her, even though he said that he would not actually turn her out, but coupled his statement that he had finished with her with the assertion that he would go out more than he did before, thereby implying that things would be worse than they had been before if she remained in the matrimonial home. The wife said, in the passage that I have read from her evidence before the Sutton justices, that she left home because of his saying this, and, although his conduct was held not to amount to cruelty, I cannot say that it is impossible that this statement, coupled with his avowal that he had finished with her, should be held to support a charge of desertion. For these reasons, unsatisfactory as I think it is that the wife's case should have been dealt with piecemeal by two courts which came to opposite conclusions about the credibility of the spouses, it is not, in my opinion, open to us to interfere with the decision under appeal, and, therefore, it is our duty to dismiss the appeal.

**COLLINGWOOD, J.:** I agree. The grounds of appeal are that the finding is wrong in law, that the issue had previously been decided by the Dorking justices and was thereby *res judicata*, that there was no evidence on which the justices could come to the conclusion at which they arrived, and that the decision was against the weight of the evidence.

I propose to look at the evidence which was given at Dorking on Sept. 17 and to compare that with the evidence given on Nov. 16 before the Sutton



justices on the summons alleging desertion. I am not going through it in detail, but I will make an attempt to see how far any additional evidence of any materiality was carried at the second hearing, namely, before the Sutton justices. The wife, having spoken of the marriage on Aug. 1, 1927, said at Dorking that it started to break up at the beginning of the war. The husband worked at a pistol rocket factory near their home, a number of girls were working at the same factory, which brought him into contact with them, and he stayed out late at night. She said she was suspicious of his association with these girls because he appeared to prefer their company to hers and neglected to take her out, and that, when she challenged him with this, it led to quarrels which often ended in his hitting her in the face. With regard to that aspect of the case, when she was before the Sutton justices she added, with regard to his failure to take her out, that when he was taking the girls out he told her: "I would not take a thing like you out", and she said that, if she asked him to do so, he flew into a rage and hit her with the flat of his hand in the face. Apart from his partiality for girls in general during the last two years or so, the wife spoke of his association with a Mrs. D., and that, she said, got gradually worse and worse, especially during the six months preceding the hearing. With regard to that, she added at Sutton that, if she asked him not to go out with Mrs. D., as she frequently did, he hit her. Again, referring to the Dorking evidence, she said that during these quarrels he indulged in threats to the effect that he would "do her in" before he had finished with her, and that recently this phrase had become more frequent and it worried and frightened her. At the hearing before the Sutton justices she made reference to an express threat to "do her in", which she said was made a week before she left, and that would be this incident of Aug. 28, to which it will be necessary to refer again. Before the Sutton justices she said that, in addition to the conduct to which I have referred, her husband, when he could not get what he wanted (referring to sexual intercourse) would hit her, and would say that he would go out, because he knew where he could get it. Matters came to a head at the end of August, 1952. He had been seeing more and more of Mrs. D., her protests as before had been met by a smack in the face, and before the justices at Sutton she added: "If I asked him not to go out with Mrs. D. or to stay in he would hit me", and she added: "He hit me once a week before I left", and: "Once he sent me across the sink", by which, I imagine, she means that he gave her a smack which made her fall thus.

The incident of Aug. 16 was dealt with by the Dorking justices as being the culminating incident in the list of acts which were alleged to constitute cruelty. On that date the husband went to Brighton, returning late in the evening, something after eleven o'clock, having been to Brighton with Mrs. D., though admittedly with that lady's husband and son as well. This led to an argument, and the argument led to the usual smack in the face, which on this occasion made her lip bleed. She was in bed at the time, and she got up to wash her mouth out with water and her husband accompanied her downstairs. She added nothing to that incident in her evidence given at Sutton, except that she said that he had refused to take her to Brighton although she had wanted to go. Of the incident of Aug. 28 the wife gave no evidence before the Dorking justices, but that there was an incident on that day, that is, the day before the wife's summons was taken out, is clear from the evidence of the husband in the course of his cross-examination, because he says that at a date before the summons was served there was a scene. It is clear from the other evidence that the summons was served on him on Sept. 3, and that when he speaks of

this scene he is speaking of the incident of Aug. 28. In the course of his cross-examination at Dorking he said: "Before summons was served there was a scene. She screamed and neighbours interfered". He explained the origin of the scene by saying that his wife had cycled down to the bus stop, seen Mrs. D. there, and had insulted her. At the hearing before the Sutton justices, the wife dealt in some detail with this incident of Aug. 28. It arose out of a visit by the husband to Redhill, and he had, his wife says, assured her that Mrs. D. was going to work that day. However, she saw Mrs. D. and spoke to her, the conversation being passed on later to the husband and described as being insulting. The wife went on to say: "At tea-time he came back. He got up", presumably meaning thereby out of a chair, "and asked me what I had said to Mrs. D. I said I told her she was to be at work", meaning thereby, "I understood you were going to be at work". Thereupon, she says, her husband hit her on the mouth and made a mark on her lip. She added: "It was Thursday or Friday evening" when this occurred "and we were in bed". August 28 was a Thursday, but it is difficult to associate this blow with the parties being in bed at the time when it was administered, because later in her evidence she says: "I called someone. He pushed me into a chair. I screamed. A Mr. B. came in and said something to him. I went to a neighbour. I was frightened of him and afraid to go to bed. He said he would do me in". Then, apparently asked again with regard to when that threat to do her in had been made, she said: "It was a week before we left", meaning thereby, "before I left the matrimonial home", which would be Aug. 28. I think she left with her sister, which would account for the plural.

I agree with LORD MERRIMAN, P., that this is not a question of *res judicata*. It is not estoppel, because the issue before the Sutton justices was an issue different from that before the Dorking justices. But it has been further contended that in this case, as in *Pike v. Pike* (1), in the words of DENNING, L.J.: "... the husband's conduct was either cruelty or it was not. It was not something different from cruelty". HODSON, L.J., makes the same distinction when he says:

"I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty",

and it is urged here that, cruelty having been negatived by the Dorking justices at the first hearing, it followed that the wife's case on the ground of desertion failed also. That is the same argument as was presented in *Edwards v. Edwards* (2). The material passage in the judgment of BUCKNILL, L.J., has already been read by my Lord. Applying the criteria in that case, the question which I ask myself is: Is there in the words of BUCKNILL, L.J., "no other evidence . . . to justify desertion?" Is this a case where, if one negatives the wife's allegations of cruelty, the blows in the face, the threats to do her physical injury, if one finds that these blows and these threats were not of sufficient gravity to comply with the test in *Russell v. Russell* (3), and that they neither did nor were calculated to injure her health, mental or physical, is there anything left which can be said to justify her in leaving the matrimonial home? In my opinion, there was something in addition to the charges of cruelty simpliciter. In the first place, there was the husband's persistent preference for other women, carried to the length of his

(1) [1953] 1 All E.R. 232.

(2) 113 J.P. 383; [1949] 2 All E.R. 145; [1950] P. 8.

(3) [1895] P. 315; *affd.* H.L., 61 J.P. 771; [1897] A.C. 395.

saying: "I would not take a thing like you out" to his wife. There was the persistent association with Mrs. D. in particular, insisted on over a period of between two and three years despite the wife's repeated protests, while at the same time he was insisting on intercourse with his wife and coupling that with the intimation that if he could not get it he knew where he could get it outside the house. There was no evidence that there was any impropriety in his association with her, but, nevertheless, he insisted on going out with her despite his wife's repeated protests and requests that he should cease to do so. Further, there was his habit of staying out late at night, again persisted in, although he knew the perfectly natural objection his wife had to it; and all these matters were getting worse and worse until the end of August, when the wife said that matters came to a head. He was seeing more of Mrs. D., and hitting the wife in the face when she protested, albeit not blows which injured her health or were calculated so to do. Finally the wife says: "On Sept. 4 I left home because he said he had finished with me. He would not turn me out, but he would go out more himself". In other words, the cause of all the wife's unhappiness for the past year or two was to be accentuated; what he knew to be the cause of his wife's unhappiness he was going to make worse, and deliberately make worse.

In those circumstances it is, in my opinion, impossible to say that there was no evidence on which the justices were entitled to find as they did, namely, that his conduct caused her to leave and justified her in leaving the matrimonial home. In my opinion, the conduct which did so cause her to leave was of a different kind from, and not merely something less than, cruelty. I agree that this appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Langhams & Letts*, agents for *Hart, Scales & Hodges*, Dorking (for the husband); *Kinch & Richardson*, agents for *Pringle & Co.*, Redhill (for the wife). G.F.L.B.

## COURT OF APPEAL

(SIR RAYMOND EVERSLED, M.R., and ROMER, L.J.)

June 19, 1953

### BIRCHALL v. WIRRALL URBAN DISTRICT COUNCIL

*Housing—Demolition order—House "unfit for human habitation"—Non-compliance with local byelaws—Housing Act, 1936 (26 Geo. 5 and 1 Edw. 8, c. 51), s. 11 (4), s. 188 (4).*

In 1950 B converted a detached timber framed building, which had been used for storage purposes on a camping site, into a bungalow consisting of one room, which was used for living and sleeping purposes, and a scullery. The building had no readily accessible water supply and did not comply with several byelaws, and the cost of repairs and making the house comply with the byelaws was estimated at over £500. In January, 1953, the council made a demolition order under s. 11 (4) of the Housing Act, 1936. B appealed to the county court under s. 15 (1) (d), and the county court judge quashed the order on the ground that the house was fit for human habitation. The council appealed and contended that the judge was bound to confirm the demolition order because, having regard to s. 188 (4) of the Act of 1936, the house was unfit for human habitation by reason of its falling short of the provisions of byelaws in operation in the district which prescribed standards to be observed in the construction of new houses.

**HELD:** the only question was whether, after taking into account all the relevant circumstances, including those specified in s. 188 (4), the house was fit or unfit for human habitation; the requirements of statutes and byelaws were relevant for consideration, but they were not decisive on the one question which the county court

judge rightly posed to himself for decision; and, therefore, his decision was right and the appeal must be dismissed.

APPEAL by Wirrall Urban District Council against an order made by His Honour Judge EMLYN JONES at Birkenhead County Court on Mar. 13, 1953.

*Edward Steel* for the Wirrall Urban District Council.

*T. H. Pigot* for the respondent, Sidney Troward Birchall.

**SIR RAYMOND EVERSHED, M.R.:** It is impossible not to feel some sympathy for the council in this case. The history of this wooden structure, now a dwelling-house and called, somewhat euphemistically, "Ideal", is a long one, but I need not narrate it in its entirety. The main point which has given rise to the present proceedings is that somewhere about the year 1950 Mr. Birchall, who owns and lives in "Ideal", converted into his permanent residence what had formerly been used as a storage for a marquee in the winter and as an appendage, so to speak, to a camping ground in the summer. The effect of his having so done was somewhat surprising. There was last year an inquiry being conducted by the Minister of Town and Country Planning into the question of the price to be paid by the local authority, on whom Mr. Birchall had served a notice requiring them to purchase the property. That notice had been served because the Cheshire County Council had earlier made an order for the removal of the shed under the Town and Country Planning Act and that order had been confirmed by the Minister. When the order had been made it was not known, and, indeed, may well not have been the fact, that this shed was, in truth, Mr. Birchall's home. The result of the disclosure was that the Minister decided to postpone for ten years the operation of the order which had been made in October, 1950, for removing the shed. Counsel for the council has told us that thereupon the order for removal was revoked.

The council, however, took the view that this shed was not really suitable, according to modern standards, for the use which Mr. Birchall was making of it, namely, as a home for himself and his wife, where they lived and slept and had their being, and so, in January of this year, a demolition order was served under s. 11 (1) of the Housing Act, 1936. Mr. Birchall appealed to the county court judge under s. 15 (1) (d) of the Act, and the county court judge, after hearing evidence, quashed the demolition order. The note which was taken of his judgment shows plainly with what care the judge considered all the matters put to him, including the point which counsel for the council has urged before us today. I cannot, I think, do better than read the last two paragraphs of his judgment and say at once that I entirely agree with the approach which the judge made. Though I have not had the advantage of hearing the witnesses or seeing the premises, those are matters of fact peculiarly within the judge's purview, so that, on the face of it, the conclusion is clearly right. These are the passages which I desire to read:

"The question is: Is the bungalow fit for human habitation or not? I am bearing in mind what statutes lay down as to water and so on. Facts in every case differ. I have seen this place. I am quite satisfied that drainage is properly dealt with by soil itself. I have seen provisions for rain water. I have seen the rooms in which people live. I have seen windows that can be opened. Fresh air. . . I do not think that fetching water three hundred yards is particularly difficult. Applying plain common sense and with ordinary meaning attached to 'unfit for human habitation', and having seen the building, I am not satisfied it is unfit. In my opinion, it is fit for human habitation."

Accordingly, he allowed the appeal.



I said at the beginning of my judgment that I feel some sympathy with the council, for earlier in his judgment the judge had said that Mr. Birchall's attitude was: "I've beaten the council on the ground of their own choosing. They lost". He seems to think that the council are going for him and not for others. It is, no doubt, very trying, when a local authority is doing its best to perform the duties placed on it, to find that a person like Mr. Birchall is engaged to his own satisfaction in what he thinks is a successful series of skirmishes against them. At the same time, I sympathise also with Mr. Birchall, because on the evidence it is plain that his way of keeping this place is quite exceptional in view of the scrupulous cleanness which the photographs disclose and the judge observed, and, since, as a fact and as the judge found, this is a clean, healthy, dwelling-house, it is no doubt equally annoying to Mr. Birchall to find the council quoting byelaws and sections of Public Health Acts which he may think are merely conjured up to try to reverse the tide of fortune which has so far flowed.

But, in my judgment, these matters are irrelevant to the question we have to consider. They are, indeed, little more, I think, than appeals to the emotions. The question and the only question is that which the judge posed: Within the meaning of s. 11 (1) of the Housing Act, 1936, is this house—for it is a dwelling-house—fit or unfit for human habitation? It is the argument put forward for the council that since this structure became a dwelling-house when it did, in 1950, you must apply, in deciding the question posed, the standards which are laid down in the Public Health Acts now applicable in the case of houses built according to plans approved by local authorities. The question, however, is not whether this dwelling-house complies with the requirements which would be applicable to a new house built with the authority of the council and in accordance with the council's byelaws. The question I have already said is the different question: Is the house fit or unfit for human habitation? I do not doubt that in this year, 1953, regard must be had to accepted standards of fitness for human habitation, but in so saying I am merely saying in other words what is laid down in the Housing Act itself, for s. 188 (4) provides:

"In determining for the purposes of this Act whether a house is fit for human habitation, regard shall be had to the extent, if any, to which by reason of disrepair or sanitary defects the house falls short of the provisions of any byelaws in operation in the district or of any enactments in any local Act in operation in the district dealing with the construction and drainage of new buildings . . .".

The judge did pay regard to those matters and rightly took them into his estimation, but once more I repeat that the question is not whether this house satisfies the requirements of these byelaws on the footing that an application was made to the council to build it as it is, but whether it is fit for human habitation. If the council's argument is correct, it seems to me to follow necessarily that every house built after the Public Health Act, 1936, came into operation must be unfit for human habitation, if it is shown that in any respect the house fails to comply with any requirements which that Act or byelaws made under it would require in the case of a house built with the authority of the local council. That seems to me an impossible construction to put on the Act of 1936. It is plain that persons residing in the circumstances and under the conditions which apply to this house must take very great care how they live to avoid their house becoming, by ordinary commonsense standards and having regard to modern conditions, unfit for human habitation. It is plain that, if the house were not, for example, most cleanly kept, very soon it would become unfit for that purpose, but the question is whether, as it is now occupied by Mr. Birchall and his wife,

it is fit, notwithstanding its manifest disadvantages judged by modern standards.

All those questions, being questions of fact, have been answered by the judge in the passages I have read which follow a careful consideration of all the evidence and an emphasis which is laid more than once in the judgment on what I have called the scrupulous cleanness of Mr. Birchall, so that the place is, as the judge says "in every way clean as a new pin and neat—admirable." In those circumstances it seems to me that there is no ground on which we could interfere with the decision of the county court judge. Mr. Birchall must now win the third round and have the satisfaction of the appeal against him being dismissed.

**ROMER, L.J.:** I agree. We have a note of a careful and full judgment which the learned judge delivered. In the course of the judgment, so far as I can see, he took into account every consideration which he should have taken into account and he posed for decision the right question, namely: Is the bungalow fit for human habitation or not? He came to the conclusion that it was fit. Accordingly, it is very difficult for the local authority to have that finding disturbed, but the general drift of counsel's argument on behalf of the authority is that the bungalow or dwelling would not have been passed by the local authority as a new building in 1950 when it first became used as such. That is true, but from that premiss he proceeds to a conclusion which I think is inaccurate. He says that, because of that, now, in the year 1953, the house must be regarded as unfit for human habitation. To my mind that is a non sequitur. The question and the only question is: After taking into account all relevant circumstances, including those specified in s. 188 (4) of the Housing Act, 1936, is the house now fit or unfit for human habitation? Although modern statutory requirements and the requirements of byelaws are naturally relevant for consideration, they are not and cannot be decisive of the one question which the judge rightly posed to himself for decision. I, accordingly, think that it was a perfectly right decision and must be upheld.

*Appeal dismissed.*

Solicitors: *Percy Hughes & Roberts*, Birkenhead (for the local authority); *Field Roscoe & Co.*, for *Berkson & Berkson*, Birkenhead (for the respondent).

F.G.

## HOUSE OF LORDS

(LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER AND LORD ASQUITH OF BISHOPSTONE)

April 27, 28, 29, 30, June 25, 1953

**LATIMER v. A.E.C., LTD.**

*Factory—Floor—Maintenance—Floor slippery from flood: water and oil—Factories Act, 1937 (1 Edw. 8 & 1 Geo. 6, c. 67), s. 25 (1), s. 152 (1).*

*Safe System of Working—Factory flooded in exceptional storm—Water mixed with oil—Floor rendered dangerously slippery—No want of care by occupiers—Accident through workman slipping—Liability of occupiers.*

Owing to an exceptionally heavy storm of rain, a factory was flooded with surface water which became mixed with an oily liquid used as a cooling agent for the machines which was normally collected in channels in the floor. When the water drained away from the floor, which was level and structurally perfect, it left an oily film on the surface which was slippery. The respondents spread sawdust on the floor, but owing to the unprecedented force of the storm and the consequently large area to be covered, there was insufficient sawdust to cover the whole floor. In the course of his duty the appellant slipped on a portion of the floor not covered with sawdust, fell, and was injured.

HELD: (i) "properly maintained" in s. 25 (1) of the Factories Act, 1937, read with the definition of "maintained" in s. 152 (1), referred to the general condition and soundness of construction of the floor and not to some transient and exceptional condition of it; a floor which was in itself of sound construction and in proper condition did not cease to be in an efficient state because there was temporarily something on it which gave rise to danger; and, therefore, the respondents were not in breach of their duty under s. 25 (1) to see that the floor was "properly maintained".

(ii) on the facts the respondents had taken every step which an ordinarily prudent employer would have taken in the circumstances to secure the safety of the appellant, and so they were not liable to the appellant for negligence at common law.

Decision of the COURT OF APPEAL, affirmed.

APPEAL by the plaintiff in the action against an order of the Court of Appeal (SINGLETON, DENNING and HODSON, L.JJ.), dated May 1, 1952, and reported [1952] 1 All E.R. 1302, affirming in part an order of PILCHER, J., dated Feb. 8, 1952, and reported [1952] 1 All E.R. 443, in which the learned judge held that there had been no breach by the respondents, the defendants in the action, of their duty under the Factories Act, 1937, s. 25 (1), properly to maintain the floors in the factory, but that they had been negligent at common law in permitting the appellant, the plaintiff in the case, to work in the factory when they knew it to be in a potentially dangerous condition. The Court of Appeal affirmed the decision of the learned judge that there had been no breach of statutory duty by the respondents, but reversed his decision on the point of negligence at common law.

*Beney, Q.C.*, and *Jukes* for the appellant.

*Marven Everett, Q.C.*, and *Croom-Johnson* for the respondents.

The House took time for the consideration.

June 25. The following opinions were read.

LORD PORTER: My Lords, in this case the appellant recovered a sum of £550 as damages for injuries which he alleged had been the result of a failure on the part of the respondents in breach of their statutory duty to maintain one of the gangways in their works in an efficient state. He relied also on an allegation of common law negligence. PILCHER, J., rejected his claim based on a breach of statutory duty, but held the respondents guilty of common law negligence. The Court of Appeal agreed with the judgment of the learned judge on the claim for breach of statutory duty, but were of opinion that there was no common law negligence on the part of the respondents.

The relevant facts are short and undisputed. The appellant was a horizontal milling machine operator employed by the respondents in their works at Southall. At those works they employ some four thousand persons and the works themselves extend over an area of about fifteen acres. On Aug. 31, 1950, the appellant was working on the night shift in the general machine room and came on duty at about 7.45 p.m. His work involved collecting barrels containing bundles of hand brake levers and weighing about two hundredweights. They had to be conveyed by him on a trolley along a passage or gangway for a distance of about thirty yards from the place where they were stored. Between about 12 noon and 3 p.m. on that afternoon there had been an exceptionally heavy storm of rain which caused the whole of the premises to become flooded with surface water. This water became mixed with an oily liquid known as "mystic" which was normally collected in channels in the floor of the building. These channels were covered with iron lids which were not watertight. The "mystic" was soluble in water and was used to act as a cooling agent for the machines. When the water which had so been impregnated drained away from the floor

it left an oily film on the surface which was slippery. After the rainfall had subsided, the respondents spread sawdust on the floor so far as they had a sufficient quantity for that purpose. They had, in fact, enough at hand for any occurrence which they could be expected to foresee, but, owing to the unprecedented force of the storm in question and the large area that had to be covered, there was insufficient sawdust to place it on portions of the floor, including the part of the floor where the barrels were situated. The principal object of spreading sawdust on the floor was to dry it, but, incidentally, it would also have some effect in decreasing the slipperiness. The respondents knew that the coating of the floor with the mixture of "mystic" and water would, to some extent, increase its slipperiness. They also knew that the appellant in the course of his work would have to collect the barrels at the place in question. At about 8.45 p.m., in the course of his work, he went to collect a barrel with the help of a fellow workman and succeeded in getting the metal lip of a trolley under the base of the barrel in order to raise it from the floor. He then placed his right foot on the axle of the trolley and pushed with his left foot, but his left foot slipped on the oily surface of the floor, with the result that he fell on his back and the barrel rolled off the trolley and crushed his left ankle. Undoubtedly, the respondents did their best to get rid of the effects of the flood, employing such of the day workers as could be spared, and obtaining volunteers from them for work in the interval between day and night work and from the night shift at a later period, but, in the learned judge's opinion, it was not possible for them to take any further steps to make the floor less slippery. I understand his view to have been, however, that, inasmuch as the effect of the storm left the gangway in question, and possibly other portions of the works, somewhat slippery, and, therefore, potentially dangerous, they should have shut down the whole works if necessary, or, at any rate, such portion as was dangerous.

My Lords, the difficulty which I feel about this solution is that neither the necessity for such an action nor its effect was ever pleaded, explored or considered until the respondents' counsel was in the course of making his final speech. No doubt, the point was then raised and argued on behalf of the respondents. It may, indeed, be that an adjournment could have been asked for at that stage and evidence called on either side. But to take such action would have meant re-casting the whole framework of the case, and I do not think it was incumbent on the respondents' representatives to take this course. In my opinion, they were entitled to rest on the evidence as given, and to ask that it should be considered as a whole and the requisite inference drawn from it. It was urged that the mere happening of such an accident cast the onus on them of explaining it and excusing themselves, but the facts material to the matters pleaded had been given in evidence and where the relevant facts have been established no question of onus arises. A number of complaints of negligence and breach of duty are set out in the statement of claim, but so far as common law negligence is concerned I can find no suggestion that the factory should have been closed, nor was any amendment asked for, or permitted, to that effect. All the particulars set out in the statement of claim consisted of complaints which the learned judge found not to have been established and which were not persisted in before your Lordships. On the issue of common law negligence, as now presented, the direction which should be given is not in doubt. It is to determine what action, in the circumstances which have been proved, would a reasonably prudent man have taken. The probability of a workman slipping is one matter which must be borne in mind,



but it must be remembered that no one else did so. Nor does the possibility seem to have occurred to anyone at the time. It is true that after the event Mr. Milne, one of the respondents' witnesses, expressed the opinion that he would not have gone on to the floor in the condition in which it was and that it would be too dangerous to do so. But this was after the event, and, though he was the respondents' safety engineer and was present until late that night, it seems never to have occurred to him that there was any danger or that any further steps than those actually taken were possible, or required for the safety of the employees. The seriousness of shutting down the works and sending the night shift home and the importance of carrying on the work on which the factory was engaged are all additional elements for consideration, and without adequate information on these matters it is impossible to express any final opinion. Moreover, owing to the course taken at the trial, there is no material for enabling one to judge whether a partial closing of the factory was possible, or the extent to which the cessation of the appellant's activities would have retarded the whole of the work being carried on. In my view, in these circumstances, the appellant has not established that a reasonably careful employer would have shut down the works, or that the respondents ought to have taken the drastic step of closing the factory.

The question whether there has been a breach of statutory duty turns on the true construction of s. 25 (1) of the Factories Act, 1937. That sub-section provides that

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained"

and s. 152 (1) defines "maintained" as meaning

"maintained in an efficient state, in efficient working order, and in good repair."

Section 25 (1), were it not for the definition, would seem merely to provide for sound construction and a proper state of repair. But the definition does give rise to a more difficult problem, inasmuch as it requires both the existence of "good repair" and an "efficient state". The further provision as to "efficient working order" may be neglected since that requisite is more appropriate to working machines than to a static portion of the premises. It has still, however, to be determined what it is which has to be in an efficient state. Does it include the elimination of some matter which is temporarily superimposed on the floor, or is the requirement confined to the floor itself? To be efficient, the appellant contended, the floor must be fit for any of the purposes for which it is intended, e.g., for support and for passing over in safety. The difficulty of such a view is that it puts an excessive obligation on the employer. Indeed, it was conceded that it could not be carried to the length of saying that a temporary obstruction, such as a piece of orange peel or the like, would make it inefficient. Once this concession is made it becomes a question of the degree of temporary inefficiency which constitutes a breach of the employer's obligation.

Primarily, in my opinion, the section is aimed at some general condition of the gangway, e.g., a dangerously polished surface, or the like, or possibly some permanent fitment which makes it unsafe. But I cannot think the provision was meant to, or does, apply to a transient and exceptional condition. If it had been directed to such a state of affairs it would have been easy to say so. Indeed, in s. 34 (2) the kind of language appropriate to such an object is to be found where there is provision that "all means of escape . . . shall be

properly maintained and kept free from obstruction". Perhaps the best illustration of the extent of the obligation which has reached your Lordships' House is to be found in *Galashiels Gas Co., Ltd. v. O'Donnell or Millar* (1), where the grips which ought to have held a lift in place at one of the floors for some unaccountable and unascertainable reason failed to act, with the result that one of the workmen fell down the shaft and was injured. No blame could be attached to the employers, yet, as the duty was absolute, your Lordships held them liable. The decision was given on the very section now under discussion and was much relied on by the appellant. That case, however, differs from the facts of the present case in that the lift itself was out of order, and no temporary superincumbent danger had been added to it. It is no authority, therefore, for holding the respondents liable in the present case. It may be added as an additional factor that the obligation is a penal one, that the phraseology is at least ambiguous, and, although it has to be remembered that the Act is intended for the protection of workmen, and to that extent should receive a benevolent construction, yet employers are not lightly to be made criminals unless a clear direction of an Act of Parliament has that effect. I agree with the Court of Appeal that this point fails and that there was no negligence at common law. I would dismiss the appeal with costs.

**LORD OAKSEY:** My Lords, I agree. On the question of common law negligence I have come to the conclusion, though not without doubt, that the judgment of the Court of Appeal ought to be affirmed. What is negligence is, in my opinion, a question of fact to be decided by the tribunal of fact. In the present case, although *PILCHER, J.*, who tried the case, did not, in terms, say that he was applying the standard of care which an ordinarily prudent employer would have taken in all the circumstances, there is, in my view, no doubt that he intended to apply that standard. If he did, and if there was admissible evidence on which he might base his finding, that finding ought only to be set aside where it is clear that he was wrong. There was such evidence in the present case since the respondents themselves proved that the flooding of their factory was unprecedented: that, owing to their system of partially open mystic drains, oil in such circumstances would, and did, escape over the factory floor: that in view of this state of affairs they put forty men on specially to lay down all the sawdust they had on the floors and passages: that they kept twenty-four volunteers on to continue the work of cleaning the floors and passages, but that they did not stop the work of the factory but allowed the night shift to come on duty. Now, although it is true that no questions were put in cross-examination to the respondents' witnesses suggesting that they ought to have closed the factory, the point was raised by the judge during the argument and no application was made for an adjournment, or for an amendment of the pleadings. The facts, indeed, were admitted, and the principal question on the issue of common law negligence was whether such facts amounted to negligence. It does not seem to me that, if a jury had found in such circumstances that the respondents had been negligent, the Court of Appeal could properly have set aside their verdict. But, no doubt, a judge's finding is not entitled to the same finality, and I think, on the whole, that, since the evidence as to the condition of the floors and passages at the time the night shift came on was very meagre and that practically the only evidence of their slippery condition was the accident to the appellant, I come to the conclusion that the conduct of the respondents can, at the highest, be said to have been an error

(1) 113 J.P. 144; [1949] 1 All E.R. 319; [1949] A.C. 275.

of judgment in circumstances of difficulty and such an error of judgment does not, in my opinion, amount to negligence.

On the question of the construction of s. 25 (1) of the Factories Act, 1937, I am of opinion that, by virtue of that sub-section and the interpretation section, s. 152 (1), the respondents were bound to maintain the floors and passages in an efficient state, but I do not consider that it was proved that they were not in an efficient state. A floor does not, in my opinion, cease to be in an efficient state because a piece of orange peel, or a small pool of some slippery material, is on it. While I do not agree that the maintenance of the floors is confined to their construction, I think the obligation to maintain them in an efficient state introduces into what is an absolute duty a question of degree as to what is efficient. I, therefore, agree that this appeal should be dismissed.

**LORD REID:** My Lords, a film of oil had been deposited by flood water on the floor of the respondents' factory. At a place where sawdust had not yet been applied to it the appellant, without realising the danger, tried to get a heavy barrel on to a trolley. He was standing on one foot and using considerable force with the other when he slipped and received severe injuries. His case is that his injuries were caused by a breach by the respondents of s. 25 (1) of the Factories Act, 1937. That sub-section provides:

"All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained".

It is not alleged that the floor was not of sound construction, but it is said that, by reason of the presence of the oil which was a source of danger, the floor was not at the time of the accident properly maintained. It seems to me that the first question is whether the film of oil can be regarded as a part of the floor. There may be difficult cases where something has been put on a floor without being incorporated with it and where it could be regarded as part of the floor, but this is not one of those cases. The oil was on the floor casually and temporarily, and seems to me to have been no more part of the floor than a banana skin dropped by a passer-by. The question, then, is whether s. 25 (1) applies to things which are not part of the floor, but whose presence on it is a source of danger. If s. 25 stood alone, I would say that it did not. No doubt the section is one dealing with safety, but, even so, keeping the surface of a floor free from dangerous material does not appear to me to come within the scope of maintaining the floor.

The difficulty in the case arises from the definition of the word "maintained" in s. 152 (1). That sub-section provides:

"In this Act, unless the context otherwise requires, the following expressions have the meanings hereby assigned to them respectively, that is to say: . . . 'Maintained' means maintained in an efficient state, in efficient working order, and in good repair."

The word "maintained" occurs in many sections, often in connection with machinery. The whole definition can then be applied without difficulty. But, unless "working order" is used in a very loose way, which one does not expect in an Act of Parliament, to ask whether a floor is in efficient working order is to ask a meaningless question. It was not disputed that this part of the definition cannot be read into s. 25 (1), and it was argued that, because the context excludes this part of the definition, it excludes the whole of the definition. I do not see why it should. I think that each part of the definition is severable. The phrase "in good repair" is clearly applicable to a floor,

but this floor did not cease to be in good repair by reason of the presence of the oil on its surface. The difficulty arises with regard to the phrase "in an efficient state". "Efficient" is an awkward word to use in connection with a floor, but I cannot reject it as meaningless. The appellant argues that a floor cannot be in an efficient state if people are liable to slip on it, but, again, I think one must ask whether the danger comes from the floor or from something which happens to be on it. It would be going a long way to say that a floor, perfectly good in itself, ceases to be in an efficient state whenever there is something on it which gives rise to danger. If there is any ambiguity, one is entitled to look at the consequences of adopting each of the possible interpretations. It is one thing to say that an employer is absolutely responsible for the condition of his floors, even if the unsafe condition has come about through no fault of his or his servants, and could not have been remedied before the accident, but I would expect clearer words if it were intended that he should also be held responsible if something dangerous got on his floor and made it for the time being "inefficient" through some inevitable accident or the fault of some other person not his servant. But I do not think that there is really any ambiguity here. The requirement of the definition is not that the floor shall be in an efficient state: it is that the floor shall be maintained in an efficient state. "Maintained" is the dominant word throughout and that throws one back to what is meant by maintaining a floor. I see little difference between maintaining a floor "properly" as required by s. 25 (1) and maintaining it "in an efficient state" as required by the definition. I have already said that I do not think that maintaining a floor includes keeping dangerous things away from it. To prevent misunderstanding, I ought, perhaps, to add that maintaining a machine in efficient working order does, I think, involve preventing foreign matter from reaching any place where it can interfere with the proper working of the machine, and for that reason I cannot get much assistance in this case from *Galashiels Gas Co., Ltd. v. O'Donnell or Millar* (1).

The appellant also alleges breach of the respondents' duty to him at common law. On that part of the case I agree entirely with the speech which my noble and learned friend, LORD TUCKER, is about to deliver and which I have had an opportunity of reading. I, therefore, agree that this appeal should be dismissed.

**LORD TUCKER:** My Lords, as to the proper construction of s. 25 (1) of the Factories Act, 1937, in the light of the definition of the word "maintained" in s. 152 (1) of that Act, I am in agreement with the conclusion reached by the trial judge, the members of the Court of Appeal and your Lordships, that it has not the wide meaning contended for by the appellant so as to render the respondents liable for the condition of the floor of this factory in the circumstances existing on Aug. 31, 1950, and I do not desire to add anything on this part of the case.

With regard to the alleged breach by the respondents of their common law duty to take reasonable care for the safety of their servants, I am in complete agreement with what was said by SINGLETON, L.J., in the Court of Appeal in his application of the standard required to the facts as found by the trial judge. I only venture to add a few observations out of respect for the careful judgment of PILCHER, J., and because it appears to me desirable in these days, when there are in existence so many statutes and statutory regulations imposing absolute obligations on employers, that the courts should be vigilant to see

(1) 113 J.P. 144; [1949] 1 All E.R. 319; [1949] A.C. 275.



that the common law duty owed by a master to his servants should not be gradually enlarged until it is barely distinguishable from his absolute statutory obligations.

In the present case, the respondents were faced with an unprecedented situation following a phenomenal rain storm. They set forty men to work on cleaning up the factory when the flood subsided and used all the available supply of sawdust, which was approximately three tons. The judge has found that they took every step which could reasonably have been taken to deal with the conditions which prevailed before the night shift came on duty, and he has negatived every specific allegation of negligence as pleaded, but he has held the respondents liable because they did not close down the factory, or the part of the factory where the accident occurred, before the commencement of the night shift. I do not question that such a drastic step may be required on the part of a reasonably prudent employer if the peril to his employees is sufficiently grave, and to this extent it must always be a question of degree, but, in my view, there was no evidence in the present case which could justify a finding of negligence for failure on the part of the respondents to take this step. This question was never canvassed in evidence, nor was sufficient evidence given as to the condition of the factory as a whole to enable a satisfactory conclusion to be reached. The learned judge seems to have accepted the reasoning of counsel for the appellant to the effect that the floor was slippery, that slipperiness is a potential danger, that the respondents must be taken to have been aware of this, that in the circumstances nothing could have been done to remedy the slipperiness, that the respondents allowed work to proceed, that an accident due to slipperiness occurred, and that the respondents are, therefore, liable.

This is not the correct approach. The problem is perfectly simple. The only question was: Has it been proved that the floor was so slippery that, remedial steps not being possible, a reasonably prudent employer would have closed down the factory rather than allow his employees to run the risks involved in continuing work? The learned judge does not seem to me to have posed this question to himself, nor was there sufficient evidence before him to have justified an affirmative answer. The absence of any evidence that anyone in the factory during the afternoon or night shift, other than the appellant, slipped, or experienced any difficulty, or that any complaint was made by or on behalf of the workers, all points to the conclusion that the danger was, in fact, not such as to impose on a reasonable employer the obligation placed on the respondents by the trial judge. I agree that the appeal be dismissed.

**LORD ASQUITH OF BISHOPSTONE:** My Lords, this appeal raises two points: (A) Are the defendants liable under the Factories Act, 1937? (B) Are they liable at common law for negligence? Of these, the first point presents the greater difficulties.

(A) The question is what the words "properly maintained", in s. 25 (1), mean. The sub-section provides that the "floors", *inter alia*, "shall be of sound construction and properly maintained". If these words stood alone and there were no definition of the word "maintain" in the statute, for myself, I should be in little doubt as to their interpretation. I should take them to mean that, at the time of its construction or installation, the floor should possess the structural qualities which a floor ought to possess, e.g., a level surface and sufficient strength to bear the stresses to which it is liable to be subjected, and that from that time on the owner of the factory should keep up, prolong or perpetuate that structural condition. But the fact cannot be

ignored that there is a definition of "maintain" in s. 152 (1), and that this definition, in part or in whole, must be read into s. 25 (1). There are three limbs in the definition. "Maintained" means "maintained in an efficient state, in efficient working order, and in good repair". This definition is capable of more than one construction. (i) Counsel for the respondents, in an attractive argument, contended that the three limbs of the definition should be read selectively or distributively, viz., that, according to the subject-matter involved, all three limbs might apply, or some two of them, or only one. Thus, in the case of a machine (e.g., a lift), there is no difficulty in applying all three. In the case, however, of a wholly and permanently passive entity, such as a floor, he argued (and I think this was common ground) that "efficient working order" was inapplicable, and, going further, that "efficient state" was also inapposite, since "efficiency" connotes at the least potential activity or mobility, which a floor does not possess. Ergo, the words "in good repair" alone applied, and these words were fully satisfied by adequate repair of the structure. (ii) The respondents also argued that, short of this, the words "of sound construction" in s. 25 (1) ran through, and coloured, both the words "properly maintained" and the definition of "maintained". The second "reason" in the respondents' case formulates this contention as follows:

"Because the definition of the word 'maintained' in s. 152 (1) of the Factories Act, 1937, means, in relation to s. 25 (1), that it is the sound construction which has to be maintained in an efficient state, in efficient working order, and in good repair."

This argument accepts the applicability of all three limbs of the definition, but treats their scope as controlled and narrowed throughout by the words "of sound construction" at the opening of the substantive sub-section. (iii) Or again, s. 25 (1), plus the definition, may be read as imposing two independent and cumulative obligations: (a) to maintain the soundness of the floor's structure; (b) to maintain the floor in an efficient state, not in respect of its structure only, but over some wider range of qualities, which might include what has been called a "non-skid" quality in the surface.

It is somewhat tempting to solve these difficulties of construction by contenting oneself with the comparatively simple test on which DENNING, L.J.'s judgment mainly proceeds. He treats the duty of maintaining the soundness of the floor *qua* floor as absolute, but distinguishes between the floor itself and things, whether solid or liquid, superimposed on it, in respect of whose presence no absolute duty, in his view, exists but only a duty of reasonable care. You must maintain the floor, but it does not cease to be maintained because cumbered with things resting on it. I do not dissent from this view, but it may be difficult to apply in practice in border-line cases. Where, e.g., a floor has polish so rubbed into it as to become absorbed and incorporated in its structure, are we dealing with a floor simpliciter or a floor plus something superincumbent on it? On the whole, I consider that the second of the three constructions outlined above is the most satisfactory, viz., that the words "of sound construction" control, colour, or canalise the whole of s. 25 (1) and the definition. The unreported decision of HILBERY, J., in *Pitfield v. Railway Executive* (1) proceeds on this basis, and I can see nothing in the *Galashiels* case (2) (which proceeded on s. 22 (1), a section with a different wording, and applied to a different subject-matter—a mobile object and a machine) which is inconsistent

(1) (1942), unreported (Winchester Assizes).

(2) 113 J.P. 144; [1949] 1 All E.R. 319; [1949] A.C. 275.

with it. On the point of construction, therefore, I am of opinion that the respondents succeed.

(B) Negligence at common law. At common law the question can only be whether, having regard to the nature and extent of the risk created by the slippery patches on the floor, a reasonably careful employer would have suspended all work in this fifteen acre factory and sent the night shift home or, whether, having done all he could (and did) do with the sawdust at his disposal, the forty production service men in the afternoon, and the twenty-four volunteers between the end of the day shift and the beginning of the night shift, he would have allowed the work to proceed. The learned trial judge concluded that a reasonable employer would have closed down. I agree with practically everything else he said in a most careful judgment. But, of course, this conclusion was crucial. In considering it, one cannot but be impressed by the following considerations: (a) It was nowhere specifically pleaded in the statement of claim that the works should have been closed down; (b) no witness for the appellant suggested that this should have been done; (c) no question was put to any witness for the defence to that effect; (d) no evidence was directed to the question, which on this issue was fundamental, what degree of dislocation or complication a complete stoppage would have entailed; (e) the point was first taken, after the evidence was closed, by the learned judge himself during the final speech of one of the counsel. In these circumstances I agree with the observations of SINGLETON, L.J.:

"If the test is, as I believe, what a reasonable employer would have done in those circumstances, I fail to see that there is any breach by the employers of the duty which they owed, and I fail to see, too, any evidence on which a finding that the employers were negligent in not closing the factory can be based."

What evidence the learned judge had before him suggests, to my mind, that the degree of risk was too small to justify, let alone require, closing down. The evidence of the appellant himself is that "you always get a certain amount of grease about". Ampstead, his fellow worker, says exactly the same, adding that on "numerous occasions" (four or five times) he had seen "mystic" well up from the channels in the floor of the factory owing to flooding. Yet the appellant says that, except for the accident to himself on this occasion in August, 1950, he has never known any accident happen to any one in the factory through these causes. I cannot resist the conclusion that on this occasion, notwithstanding the extent of the flooding, the risk was inconsiderable, and that the learned judge's conclusion cannot stand. Treated as a finding of fact, it cannot be supported on the evidence, which, as to the onerousness of the suggested remedial measure, was non-existent. Treated as an inference of fact, it was open to the Court of Appeal and is open to your Lordship's House to draw a different inference, and I would do so. I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors: *Rowley, Ashworth & Co.* (for the appellant); *Carpenters* (for the respondents).

G.F.L.B.

NOTE.

**COURT OF APPEAL**

(SOMERVELL, JENKINS AND HODSON, L.JJ.)

June 23, 1953

**DRYDEN v. DRYDEN**

*Divorce—Desertion—Termination—Adultery by deserted spouse—Onus on deserted spouse to show that adultery did not affect desertion.*

APPEAL by the wife from an order of His Honour JUDGE REWCASTLE, dated Dec. 18, 1952, made on an undefended petition by the wife for divorce on the ground of her husband's desertion.

The husband deserted the wife in 1948, and in 1949 she obtained magistrates' orders in respect of her own maintenance and that of the two children of the marriage. In her discretion statement the wife admitted committing adultery in July, 1950, and in September, 1950, as a result of which a child was born in June, 1951. According to the evidence the husband, on hearing of her adultery, took proceedings to have the order for the wife's maintenance discharged. The learned commissioner dismissed the petition.

*Stranger-Jones* for the wife.

The husband did not appear.

HODSON, L.J., said that the learned commissioner seemed to have based himself on the view that the husband's proceedings to discharge, on the ground of the wife's adultery, the order which the wife obtained against him had the automatic effect of showing that the desertion was terminated. He (HIS LORDSHIP) did not think that was the right view. It was open to the wife to discharge the burden of proving that desertion still continued notwithstanding that proceedings were taken by the husband to have the order discharged. The law applicable to that situation was stated in *Herod v. Herod* (1) in terms which had been repeatedly approved by the Court of Appeal, namely, that the adultery of the wife did not automatically terminate desertion, but it was an obstacle in the way of proving that it continued. That obstacle was often removed by the petitioner's giving evidence tending to show that in all probability the other party had no knowledge of the adultery, but once it was clear that the petitioner had committed adultery it was not an easy matter for him or her to show that that adultery had no effect on the continuance of the desertion. No attempt had been made in the present case before the learned commissioner to discharge that part of the burden. The commissioner had been asked to draw the conclusion that the husband's determination to desert was fixed and unshakable and that the adultery had had nothing to do with it. He (HIS LORDSHIP) thought the burden was not so easily discharged as that. In the circumstances HIS LORDSHIP had come to the conclusion that there ought to be an opportunity for the wife to have a re-hearing.

*Appeal allowed in part.*

Solicitors: *T. D. Jones & Co.*, agents for *Hargreaves*, Barking, Essex (for the wife). G.F.L.B.

(1) [1938] 3 All E.R. 722; [1939] P. 11.



HOUSE OF LORDS

(LORD PORTER, LORD OAKSEY, LORD REID, LORD TUCKER AND LORD ASQUITH OF BISHOPSTONE)

April 14, 15, June 25, 1953

PRESTON AND AREA RENT TRIBUNAL *v.* PICKAVANCE

*Rent Control—Security of tenure—Power to extend period—Notice to quit given more than three months after decision of tribunal—Furnished Houses (Rent Control) Act, 1946 (9 & 10 Geo. 6, c. 34), s. 5—Landlord and Tenant (Rent Control) Act, 1949 (12 & 13 Geo. 6, c. 40), s. 11 (1), (2) (b).*

On Sept. 8, 1950, a tenant having referred his contract of tenancy of a furnished house to a rent tribunal under the *Furnished Houses (Rent Control) Act, 1946*, and the *Landlord and Tenant (Rent Control) Act, 1949*, the tribunal gave a decision approving the rent and giving no direction as to security of tenure. On Dec. 9, 1950 (i.e., three months and one day after the tribunal's decision), the landlord served on the tenant a notice to quit expiring on Dec. 18. On Dec. 9, on being served with the notice, the tenant applied to the tribunal under s. 11 (1) of the *Act of 1949* for an extension of his period of tenure. On Jan. 19, 1951, the tribunal made an order extending that period, and subsequently made further orders granting extension.

HELD: although s. 11 of the *Act of 1949* was (by virtue of s. 11 (5) thereof) to be construed as one with the *Act of 1946*, it did not follow that "notice to quit" in s. 11 (1) must refer to the notice with which s. 5 of the *Act of 1946* was concerned, namely, a notice to quit served by the lessor at any time before the decision of the tribunal or within three months thereafter; s. 11 applied to any case where a notice to quit had been served and the period at the end of which it took effect had not expired; and, therefore, the tribunal had power under s. 11 (2) (b) of the *Act of 1949* to grant the extensions of tenure which they had ordered.

Decision of the COURT OF APPEAL (*sub nom. R. v. St. Helens and Area Rent Tribunal. Ex p. Pickavance*) (1952) (116 J.P. 373), reversed.

APPEAL by the Preston and Area Rent Tribunal, as the successors of the St. Helens and Area Rent Tribunal, from an order of the Court of Appeal dated May 15, 1952, and reported 116 J.P. 373, affirming the grant of an order of certiorari made by the Divisional Court, dated Feb. 12, 1952, and reported 116 J.P. 147, directed to the St. Helens and Area Rent Tribunal to bring up and quash directions given by the tribunal on Sept. 7 and Oct. 16, 1951.

The Court of Appeal (SOMERVELL and MORRIS, L.JJ., JENKINS, L.J., dissenting) held that the *Landlord and Tenant (Rent Control) Act, 1949*, s. 11 (2) (b), operated only on notices to quit covered by the *Furnished Houses (Rent Control) Act, 1946*, s. 5, and, therefore, the tribunal had no power to grant any extension of tenure under s. 11 (2) (b) where the notice to quit had been served more than three months after the tribunal's decision on the tenant's reference to them of his contract of tenancy.

*The Attorney-General (Sir Lionel Heald, Q.C.), J. P. Ashworth and R. J. Parker* for the appellants, the tribunal.

*Fox-Andrews, Q.C., and J. C. D. Harington* for the respondent.

The House took time for consideration.

June 25. The following opinions were read.

LORD PORTER: My Lords, this is an appeal from a judgment of the Court of Appeal dismissing an appeal of the appellants' predecessors, the St. Helens and Area Rent Tribunal, from a judgment of the Divisional Court of the Queen's Bench Division, which ordered that directions given by that rent tribunal on Sept. 7, 1951, and Oct. 16, 1951, be removed into the High Court of Justice, Queen's Bench Division, and that thereupon those directions be

quashed. By an order dated Nov. 5, 1952, the present appellants, who now represent the former rent tribunal, were substituted as a party in its place. The question involved in this case concerns primarily the Furnished Houses (Rent Control) Act, 1946, s. 5, and the Landlord and Tenant (Rent Control) Act, 1949, s. 11. Section 5 of the Act of 1946 is in the following terms:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that— (a) the tribunal may, if they think fit, direct that a shorter period shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

Section 11 of the Landlord and Tenant (Rent Control) Act, 1949 (hereinafter called "the Act of 1949"), is in the following terms:

"(1) Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect. (2) On an application being made under this section— (a) the notice to quit to which the application relates shall not, unless the application is withdrawn, have effect before the determination of the application; (b) the tribunal, after making such inquiry as they think fit, and giving to each party an opportunity of being heard, or, at his option, of submitting representations in writing, may direct that the notice to quit shall not have effect until the end of such period, not exceeding three months from the date at which the notice to quit would have effect apart from the direction, as may be specified in the direction; (c) if the tribunal refuse a direction under this section, the notice to quit shall not have effect before the expiration of seven days from the determination of the application. (3) On coming to a determination on an application under this section the tribunal shall notify the parties of their determination. (4) Where on an application under this section the tribunal have refused a direction under sub-s. (2) thereof, no subsequent application under this section shall be made in relation to the same notice to quit. (5) This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. [7] of this Act."

The facts are not in dispute, and so far as material to be herein stated, are as follows:—Ethel Pickavance is the owner of a dwelling-house situate at and known as 51, Rodney Street, St. Helens, in the county of Lancaster, and on or about Aug. 1, 1948, let it furnished to William John Leyland on a weekly

tenancy at a rent of £1 per week. On Aug. 1, 1950, William John Leyland referred that contract to the St. Helens and Area Rent Tribunal under the provisions of the Furnished Houses (Rent Control) Act, 1946, s. 2. The tribunal heard the parties and gave their decision on Sept. 8, 1950. They approved the rent and did not reduce the statutory period of three months during which a notice to quit would not take effect. On Dec. 9, 1950, i.e., three months and one day after their decision, a notice to quit 51, Rodney Street, was served on William John Leyland to vacate by Dec. 18, 1950. On the same day that the notice to quit was served, William John Leyland applied to the rent tribunal under the Landlord and Tenant (Rent Control) Act, 1949, s. 11, for an extension of the period at the end of which the notice to quit was to take effect, and on Jan. 19, 1951, the rent tribunal heard the application, granted the application and extended the period. On Mar. 6, 1951, before the extended period had expired, he again applied for a further extension, and was granted an extension until June 16, 1951. On June 4, 1951, a third application was made to the rent tribunal for a further extension, and on Sept. 7 the rent tribunal extended the period until Sept. 11, 1951. Finally, on Sept. 9, 1951, a further application was made, and on Oct. 16, 1951, the rent tribunal directed that the period should be extended until Dec. 11, 1951. On Dec. 7, 1951, pursuant to leave granted by a Divisional Court of the Queen's Bench Division, Ethel Pickavance applied by notice of motion dated Jan. 10, 1952, to the Divisional Court for an order of certiorari to remove into the High Court and quash the two directions of the rent tribunal given respectively on Sept. 7, 1951, and Oct. 16, 1951. The application was heard on Feb. 12, 1952, by a Divisional Court, which unanimously granted the order of certiorari and quashed the directions. The St. Helens and Area Rent Tribunal thereupon appealed to the Court of Appeal, and on May 15, 1952, that court, JENKINS, L.J., dissenting, gave judgment, dismissing the appeal with costs. Leave was given to the rent tribunal to lodge a petition of appeal to your Lordships' House on condition that, if successful, they would not seek to disturb the order as to costs in the Court of Appeal and would not ask for costs of the hearing before your Lordships.

Before the true construction of the relevant sections is discussed, it is, I think, desirable to bear in mind the exact position of the tenant at the time when the three months' protection given by the Act of 1949 came to an end. At that moment he was still in possession of the premises under his contract of tenancy, and no application for an extension of time was then necessary. Indeed, subject to the possibility that notice might be given at some future date, there was nothing of which to ask an extension. It would only be required if, as the respondent asserts, the tribunal had jurisdiction only to grant its first extension, provided application was made within the statutory three months. It is in the light of these circumstances that the material sections of the two Acts have to be construed.

In this state of facts, the appellants contend that their case plainly comes within the provisions of s. 11 of the Act of 1949. The contract, they say, had been referred to a tribunal and had not been withdrawn. A notice to quit had been served, and the period at which the notice took effect had not expired. The scheme adopted in the two Acts apparently was that the termination of the tenancy brought about by the notice should not take effect until the hearing should be concluded, and under the earlier Act that the tenancy itself should be extended to a date three months after the determination of the application by the tribunal. So far as I understood the argument on behalf of the respondent, the method by which protection is given to the tenant is so interpreted

by both sides: the only difference between the parties being whether the first application for extension must be made within the three months.

The argument on behalf of the respondent was, as I think, most succinctly put by MORRIS, L.J., in the Court of Appeal when he said:

"The requirement that s. 11 must be construed as one with the Act of 1946 makes it inappropriate to consider the words of s. 11 (1) in isolation. The phrase ' . . . at any time when a notice to quit has been served and the period at the end of which the notice takes effect . . . has not expired ' refers, in my judgment, to the period between the serving of a notice to quit and its time of taking effect. But the words 'a notice to quit' are not explained. It is not specified by whom the notice is to be given nor is there any mention as to the time of its service. This omission is explained if the reference is to a notice to quit as specified in the Act of 1946. It is only in s. 5 of the Act of 1946 that a notice to quit is referred to. The phrase 'a notice to quit' in s. 11 (1), in my judgment, denotes a notice to quit of the particular kind set out in s. 5, that is, a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. The important words of s. 11 (1) are as follows: ' . . . at any time when a notice to quit has been served, and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired . . . ' If the period at the end of which 'the notice' takes effect is being fixed by virtue of the Act of 1946—it is plain that 'the notice' referred to is a notice to quit served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter. It is a notice to quit of the same kind which, in my judgment, is referred to if the period at the end of which the notice takes effect is being fixed by virtue of the contract or by virtue of s. 11."

Undoubtedly, if it were not for the provisions of s. 11 of the Act of 1949, the landlady would be entitled to possession at the end of the three months, or at the moment at which the notice to quit expired, whichever might be the later date, and in that case no extension beyond the relevant period could be given. But the material period is not necessarily the ending of the three months, it may be the termination of the period of a notice that ends at a later date. What, then, is the effect of the provisions of s. 11? I cannot say that I myself gain any assistance in construing it from the insertion of the words "at any time": they are qualified by the condition that a notice to quit must have been "served", and that the date for quitting the premises should not have expired, but in no other way. Nor am I helped by the provision that the reference must not have been withdrawn. Its object is to ensure that the applicant should make up his mind once for all which course he intends to adopt. Taking the wording of s. 11 by itself, every word is given due weight if the construction propounded by the appellants is adopted—and notably so in the phrase

"the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired."

This expression seems to deal with three separate periods within which an application for extension may be made, i.e., (i) if the contractual period of notice is still running; (ii) if that period has been extended by the three months respite given by the Act of 1946; and (iii) if a further extension has been given under the Act of 1949 and application is made before that extension has expired.



On the other hand, if the respondent's construction is adopted, I find it difficult to attribute their full and natural effect to the words "by virtue of the contract". According to the construction contended for on her behalf as I understand it, "the period at the end of which a notice takes effect by virtue of the contract" must be limited to the period at which a notice to quit which has been given within the three months' exemption has not expired. The whole strength of the respondent's argument depends on an insistence that, inasmuch as under s. 11 (5) of the Act of 1949 that section is to be construed as one with the Act of 1946, a notice to quit under both sections has the same connotation. Under s. 5, the notice to quit must be a notice served on the lessee before the decision of the tribunal or within three months afterwards: therefore, it is argued, s. 11 applies only where a notice has been given within this time: the two sections should be read as if they had been inserted consecutively in the same Act and applied to the same circumstances. Even if they had been so inserted in one Act, I should not have taken this view. I cannot see that the provisions of s. 11 require, or even suggest, such a construction. The expression "the period at the end of which the notice to quit takes effect . . . by virtue of the contract" is couched in the widest terms and, *prima facie*, refers to any notice whenever given which is still running. No doubt the giving of further time must be an extension of an existing tenancy, but, in the present case, the tenant remained in possession as a contractual tenant until the expiry of the notice to quit and was still a tenant until that moment. He comes under s. 11 because the only step taken to end his tenancy was the notice to quit given on Dec. 9, 1950, and the period of that notice had not expired.

\* It is suggested that to construe the section in this way is a hardship on the landlord because, if it be right, a tenant who had once made an application to the tribunal might, at some long subsequent time, apply for an extension. But this argument assumes that the landlord refrains from giving notice until a remote future time. In fact, he always has the remedy in his own hands: he can give notice at any time; a notice which may even end before the three months though it will not be effective until after that date. Moreover, it has to be borne in mind that the Act of 1949 does not provide that s. 11 is to be read with s. 5 of the earlier Act: it is to be read with that Act generally, and there are many other provisions of that Act to which that reference is applicable, e.g., s. 2 (1) and (3). Such an application seems to me to justify the use of the words "read with" in s. 11 of the Act of 1949, and negatives the necessity of confining the meaning of those words in that Act to a notice such as would be required under s. 5 of the Act of 1946. The expression "notice to quit" is a well-known form of words which conveys a well recognised meaning and should be given its ordinary significance unless there is some overriding necessity for limiting their scope. No doubt it is in one sense a hardship on the landlord to be subject in the case of a furnished lodging to a suspension of his right to recover possession. But this hardship exists in the case of an unfurnished tenancy, where the restriction is plainly established, and there is nothing exceptional in finding a limitation, though to a lesser degree, where the premises are let furnished.

It is urged, however, that to accept the appellants' contention would be to make a substantial alteration by an amending law which is destructive of the earlier provisions, and such cases as *Union of South Africa (Minister of Rys. & Harbours) v. Simmer & Jack Proprietary Mines* (1), *Aristoc, Ltd. v. Rysta, Ltd.* (2),

(1) [1918] A.C. 591.

(2) [1945] 1 All E.R. 34; [1945] A.C. 68.

and *River Wear Comrs. v. Adamson* (1) were quoted in support of the contention that an amending statute should not be so construed. What is a substantial alteration may be a matter of some difficulty, but in the present case I do not find the alteration said to be effected either so substantial or destructive of the provisions of the earlier Act as to lead me to reject what I think is the more obvious meaning. Moreover, it is at least arguable that s. 11 does make an alteration in one matter. Section 5 applies only in a case where the contract has been referred to the tribunal by the lessee or local authority. Under s. 2 (1) of the Act of 1946, however, either the lessor, or lessee, or local authority, may refer it, and, therefore, as the two Acts are to be construed as one, s. 11 of the Act of 1949 enables a lessee to apply to the tribunal for an extension not only where he himself has referred the matter but also where his lessor has done so.

The Divisional Court have found some support for their decision in *Rex v. Folkestone & Area Rent Tribunal. Ex p. Sharkey* (2). The decision in that case was that neither section could be called in aid where a notice had been given before the tenant's application was made to the tribunal: a decision which I should have thought clearly right on the wording of s. 5. But it is suggested that the reasoning in that case showed that the object of s. 5 was to prevent retaliation by the landlord, as LORD GODDARD, C.J., says, and that s. 11 gave no new power to the tribunal. I cannot, myself, accept so limited an application. Obviously the later Act did give some new power, since without it there could have been no additional extension of the tenancy. The only question is how far that power extends.

It will be observed that in this analysis I have made no reference to the anomalies which would result from either of the constructions sought to be put on the section. My reason for adopting this course is that, admittedly, whichever reading is preferred, unconsidered and anomalous results must follow. They have been referred to in the Court of Appeal by SOMERVELL and MORRIS, L.J.J., on the one side, and by JENKINS, L.J., on the other. To my mind, they cancel one another out and neither party can draw any satisfactory support from them. I found my decision on what I regard as the natural meaning of s. 11 and see no sufficient reason for limiting its effect. I would allow the appeal.

My Lords, LORD OAKSEY is not able to be present, and he has asked me to say that he has had the advantage of reading the opinion of LORD REID, which will be read hereafter, and he agrees with it.

**LORD REID:** My Lords, the Furnished Houses (Rent Control) Act, 1946, provided for tribunals being set up to deal with rents of furnished houses and other residential accommodation not covered by the Rent Restrictions Acts. The lessor, or the lessee, or the local authority, may apply to the local tribunal and the tribunal may approve the rent payable under the parties' contract or reduce it or dismiss the application. If a rent is approved or reduced it is entered in a register and no more than that rent can thereafter be charged for the premises. But on change of circumstances the case can be re-considered by the tribunal, and then the rent may be either increased or reduced. Apparently, it was thought that if the lessee or the local authority applied to the tribunal, the lessor might seek to retaliate by giving notice to quit, and, as such premises are often held by the lessee on as little as a week's notice, the possibility of such retaliation might well deter lessees or local authorities

(1) (1877), 42 J.P. 244; 2 App. Cas. 743.

(2) 116 J.P. 1; [1951] 2 All E.R. 921; [1952] 1 K.B. 54.

from applying to the tribunal. Accordingly, the Act, by s. 5, gives a limited measure of security of tenure to lessees. Section 5 is in the following terms:

"If, after a contract to which this Act applies has been referred to a tribunal by the lessee or by the local authority (either originally or for re-consideration), a notice to quit the premises to which the contract relates is served by the lessor on the lessee at any time before the decision of the tribunal is given or within three months thereafter, the notice shall not take effect before the expiration of the said three months: Provided that—(a) the tribunal may, if they think fit, direct that a shorter period shall be substituted for the said three months in the application of this section to the contract that is the subject of the reference; and (b) if the reference is withdrawn, the period during which the notice is not to take effect shall end on the expiration of seven days from the withdrawal of the reference."

For the purposes of the present case it is, I think, enough to note (i) that if the application to the tribunal was made by the lessor, then s. 5 has no effect, and the lessor is entitled at any time to give and enforce notice to quit in the ordinary way; (ii) that if the application was made by the lessee or local authority, the protection given by the Act applies whether or not the applicant was successful in getting the rent reduced and that protection can only be modified by the tribunal giving a direction under proviso (a) to s. 5; and (iii) that the Act does not invalidate any notice to quit, but only provides that notices which would otherwise have taken effect within three months after the decision of the tribunal shall not take effect until that period has elapsed. Whether or not s. 5 confers any benefit on the lessee depends, not on the date when notice to quit is given, but on whether the notice would, or would not, have taken effect before the expiry of the three months, and a notice given within the three months but not due to take effect until after that period is not touched by the section. In effect, the Act provides that the lessee's occupation cannot be brought to an end by the lessor within the three months unless the tribunal gives a direction which allows that to be done. And there is nothing in the Acts enabling the period of three months to be extended.

Three years later the Landlord and Tenant (Rent Control) Act, 1949, was passed, and one of its objects was

"to amend the Rent of Furnished Houses Control (Scotland) Act, 1943, and the Furnished Houses (Rent Control) Act, 1946, as respects security of tenure"

(I quote from the long title of the Act). The only section of the Act which deals with the position in England is s. 11. Section 11 is in the following terms:

"(1) Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act, and the reference has not been withdrawn, the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period: Provided that an application shall not be made under this section where the tribunal have directed under para. (a) of the proviso to s. 5 of the Act of 1946, that a shorter period shall be substituted for the period of three months specified in that section as the period before the end of which a notice to quit shall not have effect. (2) On an application being made under this section—

(a) the notice to quit to which the application relates shall not, unless the application is withdrawn, have effect before the determination of the application; (b) the tribunal, after making such inquiry as they think fit, and giving to each party the opportunity of being heard, or, at his option, of submitting representations in writing, may direct that the notice to quit shall not have effect until the end of such period, not exceeding three months from the date at which the notice to quit would have effect apart from the direction, as may be specified in the direction; (c) if the tribunal refuse a direction under this section, the notice to quit shall not have effect before the expiration of seven days from the determination of the application. (3) On coming to a determination on an application under this section the tribunal shall notify the parties of their determination. (4) Where on an application under this section the tribunal have refused a direction under sub-s. (2) thereof, no subsequent application under this section shall be made in relation to the same notice to quit. (5) This section shall be construed as one with the Act of 1946, and references in this section to that Act shall be construed as references to that Act as extended by s. [7] of this Act."

The sole question before your Lordships is whether s. 11 has any application in this case. In 1948 the respondent let to a Mr. Leyland a furnished house in St. Helens on a weekly tenancy. In August, 1950, the tenant made an application to the local tribunal with the object of getting his rent reduced, but he was unsuccessful, and on Sept. 8 the tribunal approved the existing rent of £1 per week. Section 5 of the Act of 1946 would have applied if the respondent had given notice to quit to take effect before Dec. 8, but she did not do so. She did, however, give notice to quit on Dec. 9 to take effect on Dec. 18. During the currency of this notice the tenant made application to the tribunal under s. 11 of the Act of 1949 for extension of the period of notice and the tribunal extended the period until Mar. 11, 1951. Further applications were made, and granted, by which the period was successively extended to June 16, Sept. 11 and Dec. 11. The respondent had objected to all these applications on certain grounds, but she had not questioned the power of the tribunal to grant them. But when the matter came before the court she took the point that the case had never fallen within the scope of s. 11 because s. 11 only applies if notice to quit has been given within three months of the date of the decision of the tribunal, and her notice was not given within that period. She maintained that the tribunal had no power to grant any of these applications, and that is the point which is now in issue.

That question depends on the proper interpretation of the initial part of s. 11. The first three requirements of the section are, undoubtedly, satisfied in this case. The contract was one to which the Act of 1946 applied, it was referred to a tribunal under that Act, and the reference was not withdrawn. The section then provides:

"the lessee may, at any time when a notice to quit has been served and the period at the end of which the notice takes effect (whether by virtue of the contract, of the Act of 1946 or of this section) has not expired, apply to the tribunal for the extension of that period."

Certainly this phraseology is involved and it requires careful analysis, but after studying it I do not think that there can be much doubt about what these words would mean if they were read by themselves. The real difficulty begins when one reads them in their context, but first one must see what they would mean by themselves. The words between the commas state the limits of time



between which the lessee may apply to the tribunal; he may apply at any time between the service of the notice to quit and the expiry of the period at the end of which the notice is due to take effect. The words within the brackets set out the three possible ways in which the period of notice would come to an end and the notice would take effect if it were not extended by application under s. 11. First, a notice may take effect by virtue of the contract: that applies in a case where the Act of 1946 has not extended the period of notice, because the date when the notice to quit would take effect in the ordinary way is more than three months after the date of the decision of the tribunal. Secondly, a notice may take effect by virtue of the Act of 1946: that applies in a case where the notice to quit would, but for that Act, have taken effect before the expiry of the three months, but s. 5 has prevented that and has extended the period of notice to the end of the three months. And thirdly, a notice may take effect by virtue of "this section", i.e., s. 11 of the Act of 1949: that applies in a case where the lessee has already obtained one or more extensions under s. 11 and is seeking a further extension, and he must then apply for that before the end of the last extension. There are no words which state that the section only applies if the notice to quit has been given within some time limit: and there are no words which state that the section applies if the notice is given at any time. The words "at any time" which follow the comma do not refer to the time when the notice may be given: they refer to the time when application may be made to the tribunal. So the words with which I have been dealing do not enact any limitation of time within which notice to quit must be given if s. 11 is to apply, but they do not exclude such a limitation being read in by implication if a sufficient reason for doing this can be found elsewhere.

The part of s. 11 on which the respondent relies as requiring such a limitation is sub-s. (5) which provides—"This section shall be construed as one with the Act of 1946 . . ." In my opinion, this means neither more nor less than that s. 11 must be read as if it were a section in the Act of 1946. There is no difficulty about so reading it. It does not alter or amend anything in the Act of 1946. It adds something new, which is materially different in character from anything in the Act of 1946. The lessee's right under s. 5 of that Act arises automatically, but it can only last for a short time. The lessee's right under s. 11 of the Act of 1949 only arises on an express decision of the tribunal, but if the tribunal so choose it can be continued for an indefinitely long period. The respondent's argument requires that s. 11 shall be treated as in some way subordinate to s. 5. The argument was put in various ways. It was said that "notice to quit" in s. 11 must have the same limited meaning and scope as it has in s. 5, which is the only place in the Act of 1946 where that phrase occurs, and that, if the conditions precedent to bringing s. 5 into operation do not exist, they cannot arise under s. 11. And then it was said that s. 11 is an amending section, and that an amendment should not be held to make a fundamental or far reaching change if adequate effect can be given to the words of the amendment without producing that result. These arguments might have great weight if s. 11 could be read as only conferring some additional protection in cases where a limited protection had already been given by s. 5, but I find it impossible so to read s. 11. Section 11 appears to me to apply to some cases which are wholly outside the scope of s. 5. Section 5 is expressly limited to cases where the reference to the tribunal has been made by the lessee or the local authority, whereas there is no such limitation expressed in s. 11. Section 11 could not have been drafted without the terms of s. 5 being prominently in view, and the failure

to repeat the limitation to cases where the reference was by the lessee or the local authority must have been deliberate. So s. 11 must be held to apply to cases where the reference to the tribunal was by the lessor and no proceedings had been initiated by the lessee or local authority before the notice to quit; and s. 11 must, therefore, have a wider object than merely to afford some defence against retaliation by the lessor if the lessee or local authority invokes the statutory procedure. Then the words "by virtue of the contract" within the brackets near the beginning of s. 11 (1) do not consist well with the respondent's argument. As I have already said, they apply, and can only apply, to cases where s. 5 has not applied to extend the period of notice: if s. 5 had applied, the notice would take effect by virtue of the Act of 1946. On the respondent's argument, the words "by virtue of the contract" have an exceedingly limited application. The respondent does not argue that s. 11 only applies when s. 5 has already applied to the case: that would deny all force to these words. The argument is that s. 11 only applies if the notice to quit was given within the period mentioned in s. 5, and on that view there might be a case where the lessor gave notice shortly before the expiry of the three months, but the notice was not due to take effect until after the end of the three months, and the words "by virtue of the contract" would then apply. But the wording of s. 11 does not suggest so limited an application. And another difficulty emerges, if I am right in thinking that s. 11 applies to cases where the original reference was by the lessor: s. 5 has no application to them and it is not easy to see why the period mentioned in s. 5 should be imported into s. 11 so as to affect them.

I find no similar difficulties involved in the interpretation for which the appellants contend. Section 11 is not dependent on s. 5 and, once the three initial conditions in s. 11 are satisfied, any lessee on whom a notice to quit is served can apply to the tribunal, whatever be the interval between the original decision of the tribunal and the service of the notice. So far as I can see the only substantial objection to this interpretation is that it gives rise to serious anomalies in the practical application of the Act, but the respondent's interpretation gives rise to others hardly less substantial, and anomalies are inevitable under a scheme which gives nothing to tenants whose contracts have not been referred to a tribunal, but may give to others, although their application to the tribunal has been unsuccessful, a right to remain in possession for as long as the tribunal will allow, there being no direction or guidance to tribunals how or on what principles they are to exercise this novel jurisdiction. Accordingly, I do not think it right in this case to take account of considerations of a general character which might be relevant if only one of the competing interpretations produced anomalies. Simply taking the words of the Acts as they stand, I am satisfied that the appellants' interpretation is the more natural and straightforward and I think that it is, therefore, to be preferred. I agree that the appeal should be allowed.

**LORD TUCKER:** My Lords, this appeal turns on the meaning of the words "a notice to quit" in the Landlord and Tenant (Rent Control) Act, 1949, s. 11 (1). It is, I think, agreed by both sides, and by all the judges who have dealt with this case, that s. 11 standing by itself is unambiguous and in its ordinary and natural meaning would apply to a notice to quit given at any time. It is, however, contended by the respondent that the words "a notice to quit" should be given a restricted meaning, because s. 11 (5) provides:

"This section shall be construed as one with the Act of 1946, and references

in this section to that Act shall be construed as references to that Act as extended by s. [7] of this Act."

It is said that the result of this sub-section is that "a notice to quit" must mean *the* notice to quit referred to in s. 5 of the Act of 1946, viz., a notice to quit the premises to which the contract relates served by the lessor on the lessee at any time before the decision of the tribunal is given, or within three months thereafter. Section 5 of the Act of 1946 is the only section which mentions a notice to quit. This is the construction which has found favour with the Divisional Court and the majority in the Court of Appeal.

The exact consequence of a provision that one Act is to be construed as one with another, beyond incorporating the definitions contained in the first Act, is not altogether easy to ascertain, because it would seem that, if both Acts are dealing with the same subject-matter, it would in any event in a case of ambiguity be necessary to construe the second Act in the light of the provisions of the first. In the present case, having regard to s. 8 of the Act of 1946, which gives power to make procedural regulations, it would seem that, in order to make it clear that such regulations apply to applications under s. 11 of the Act of 1949, some such provision as that contained in sub-s. (5) was desirable. I am, however, prepared to accept the respondent's contention that one result of sub-s. (5) is that s. 11 should be construed as if it were inserted immediately after s. 5 in the Act of 1946 and I, therefore, approach its construction on that footing. It would have been a most remarkable piece of draftsmanship if s. 11 of the Act of 1949 in its present form had been inserted immediately after s. 5 in the Act of 1946 with the intention of producing the result contended for by the respondent. The opening words of s. 11 (1) are:

"Where a contract to which the Act of 1946 applies has been referred to a tribunal under that Act",

not—be it observed—under s. 5 of that Act but "under that Act". If s. 11 followed s. 5 and the draftsman had intended in s. 11 to include only references under s. 5, he would have said "has been referred to a tribunal under the preceding section", and to achieve the same result in a subsequent Act he would have said "has been referred to a tribunal under s. 5 of the Act of 1946". It seems to me, therefore, clear that at the outset s. 11 is dealing with references which are not limited to references made under s. 5 of the Act of 1946, but must include references by the lessor under the provisions of s. 2 of the Act of 1946. This view is, I think, strengthened by the fact that s. 11 (5) of the Act of 1949 requires that s. 11 shall be construed as "one with the Act of 1946", not as one with s. 5 of that Act.

Proceeding, therefore, on the basis that, at the outset, the subject-matter of s. 11 extends beyond the subject-matter of s. 5, I cannot understand what rule of construction can limit the later words "a notice to quit" to the particular kind of notice referred to in s. 5. If this had been intended the draftsman would surely have said "a notice to quit served within the period referred to in the preceding section", or would have repeated the language of that section, or in a later Act would have said "a notice to quit served within the period referred to in s. 5 of the Act of 1946", or, more probably, would have repeated the language of the former section. Instead of this, we find the general words "a notice to quit" used in contrast to the restricted kind of notice which has been dealt with in the section which, for present purposes, we are considering as if it had preceded s. 11. The fact that in s. 11 the words "the premises to which the contract relates" have not been repeated, although the notice referred to must necessarily be a notice to quit the premises to which

the contract relates, is not sufficient to persuade me that "a notice to quit" is merely an abbreviated reference to the notice referred to in s. 5, being a notice served within the limits of time therein prescribed. The opening words of s. 11 (1): "Where a contract to which the Act of 1946 applies has been referred", make it clear that the notice to quit must be a notice to quit the premises to which such contract relates, though it would, no doubt, have been tidier to repeat the words which had been used in s. 5.

In the result, I can find no justification for restricting the ordinary meaning of the language of s. 11, especially in view of the fact that the section is admittedly designed to extend the security of tenure afforded by s. 5. The limits of that extension must, I think, be ascertained from the ordinary meaning of the language used, read in conjunction with the Act of 1946, including s. 5, and so read do not necessarily impose the limits contended for by the respondent.

My Lords, I have endeavoured to explain in my own words my reasons for differing from the construction placed on this section by five of the six judges in the courts below, but I am conscious that I have added little, if anything, to the detailed analysis of these sections by JENKINS, L.J., and I would only add that I can find nothing in the other judgments, nor have I heard anything in the course of argument before your Lordships, which demonstrates any flaw or fallacy in the process of reasoning by which he arrived at the conclusion that the applicant for the order of certiorari had failed to establish a lack of jurisdiction in the tribunal. I would, accordingly, allow the appeal.

**LORD ASQUITH OF BISHOPSTONE:** My Lords, I had prepared an opinion in this case, but shortly afterwards I had the advantage of reading that of my noble and learned friend, LORD REID, and I found myself in such complete agreement with it, that I thought, and think, it would serve no purpose to add an independent opinion of my own. I agree that the appeal should be allowed.

*Appeal allowed.*

Solicitors: *Solicitor, Ministry of Health* (for the appellants); *Neve, Beck & Co.*, agents for *Joseph Davies & Son*, St. Helens (for the respondent).

G.F.L.B.

## PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND COLLINGWOOD, J.)

June 10, 11, 1953

KEMP v. KEMP

*Desertion—Constructive desertion—Association by husband with woman not resulting in adultery—Revival of condoned adultery.*

*Husband and Wife—Majority decision of justices—Need of dissenting justice to give reasons.*

The parties were married in 1945. In 1949 the husband committed adultery, but the wife forgave him and they continued to live together as man and wife. Towards the end of 1952 the husband began to stay out late at night, coming home two or three times a week between 3 a.m. and 8 a.m. The husband knew that this conduct would arouse the wife's suspicions, but the only explanation that he gave at first was that he had been out with friends. Later, he said that there was a woman, but that there was nothing wrong in the association, and that she, the woman, was going away after Christmas. The wife went, with the husband's consent, to spend Christmas with relatives and did not return. On a summons by the wife alleging that the husband had deserted her,

**HELD:** although the husband's present association with the other woman was



not found to have been adulterous, it was sufficient in law to revive the condoned adultery in 1949, and was serious enough to justify the wife in withdrawing from cohabitation and to found a charge of desertion.

Observations of SIR J. P. WILDE in *Winscom v. Winscom & Plowden* (1864) (3 Sw. & Tr. 382), applied.

Per LORD MERRIMAN, P.: I do not think that, even if it is made clear at the hearing or is expressly stated at the time when the finding is made, that the decision of justices in a case relating to a matrimonial dispute is not unanimous, it entitles the parties to demand that the dissentient justice or justices shall furnish a written statement of the reasons for the dissent, and I certainly deprecate encouraging the establishment of any such practice.

APPEAL by the wife against the dismissal on Jan. 9, 1953, by the Leeds city justices of her summons alleging that her husband had deserted her.

The parties were married in 1945 and there was one child of the marriage. In 1949 the husband had committed adultery, but the wife forgave him and they continued to live together as man and wife. It was the custom for the husband to hand his weekly wages to the wife and to receive back a certain sum as pocket money. On Dec. 24, 1952, the wife went, as previously arranged with the husband, to spend Christmas with her relatives in Nottingham. On the same day she took out summonses under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that her husband had deserted her and had wilfully neglected to provide her with reasonable maintenance. At the hearing before the justices the wife stated that during the latter part of 1952 the husband had been keeping very late hours, coming home several times a week between 3 a.m. and 8 a.m., and refusing to give any explanation other than that he had been staying with friends; that she was suspicious and was not satisfied with his refusal to explain his conduct, and when she had taxed him with having been seen walking arm in arm in Leeds with another woman he had said there was "nothing in it" and had continued his habit of staying out "practically all night"; that the husband had kept her short of money; that on Dec. 23, 1952, the husband came in at 11.30 p.m. saying that he had been at his mother's, but she found that that was not true, and, having challenged him about it, asked him if he was going to mend his ways, to which he had replied "After Christmas" and had added that the other woman was going away after Christmas and that there was nothing wrong in the association; that she had replied that if that was all the satisfaction she was going to get she would not come back after Christmas; and that on Dec. 24, she went, as agreed with her husband, to spend Christmas with her relatives in Nottingham and had not returned home. The husband admitted in evidence that he had committed adultery in 1949 and that his wife had forgiven him, and that he knew that when he began to stay out late at night his wife would be suspicious. He also stated that his wife had said that she wanted to be near her relatives in Nottingham, but that he did not want to go there as he was settled in Leeds, and that, although he had been out with another woman, he had not committed adultery. He then said:

"The address I have been at is . . . and the name is [M.] . . . I used to go to dances and then go to the house for supper. Mr. and Mrs. [M.] . . . and her daughter live at the house. Mr. and Mrs. [M.] . . . used to go to bed. I used to sleep on the couch. I do want to live with my wife and I will mend my ways. The name of the other woman is Mrs. [B.] . . . and she is the daughter of Mr. and Mrs. [M.] . . . She has not left Leeds. I did say that after Christmas I would not stay out late any more. The woman is a married woman and I think she is separated. She is living

apart from her husband . . . We [he and his wife] could go out together in Leeds. The woman won't be here in Leeds for long. I did tell my wife the woman was leaving Leeds".

He denied that he had told his wife that he would come in at a proper time when the woman had left Leeds.

The justices, by a majority of two to one, dismissed the summons for desertion and stood over the summons for wilful neglect to maintain pending the wife's appeal against the dismissal of the first summons.

*Baskerville* for the wife.

The husband did not appear.

**LORD MERRIMAN, P.:** It appears that of the three justices sitting, two were in favour of dismissing the summons and one was of the contrary opinion. In other words, the decision was by a majority, and it is evident that when the question arose of stating the reasons for the decision, the wife's solicitors were anxious to obtain the statement of the reasons for the dissenting justice's view. The clerk was reluctant to call on the dissenting justice, who happened to be the chairman, to give, as it were, a separate judgment, and attention was called to an observation I am reported as having made in *England v. England* (1) ([1953] P. 19): "The justices found by a majority (a fact which is irrelevant, in my opinion, if it ought to have been disclosed at all) . . ." My recollection is that our attention had been called to some observations by the Lord Chief Justice, when, on a Case Stated in some criminal matter, it was recorded that the decision was that of a majority and he had said that he thought that ought not to be mentioned. The observation does not appear in any of the regular reports, and probably it was a remark which was quoted in some newspaper at or about the time we gave our judgment in *England v. England* (1). However that may be with regard to a Case Stated in some criminal matter, I see no reason why, in some way or another, it should not be indicated in cases relating to matrimonial disputes that the decision was not unanimous. But I do not think that, if that is made clear during the hearing or when the finding is announced, it entitles parties to demand that the dissentient justice or justices shall furnish a written statement of their reasons for the dissent, and I certainly deprecate encouraging the establishment of any such practice. I think we must approach this case on the basis of the reasons given by the majority as the reasons for the decision, albeit we know that they did not command the assent of one member of the court. I do not think it would be right for us to weigh up the two rival judgments and say we prefer the one to the other. What we have to decide is whether the reasons for the decision commend themselves to us.

[His LORDSHIP stated the facts and continued:] The majority of the justices find that on account of the husband's admission of adultery on a former occasion the wife had been suspicious of him. They say that, while the wife was silent on sex matters, the husband was sincere when he said: "She has not been a willing wife to me for years. If she will have more affection for me, I will mend my ways." That quotation, which they accept, assumes that his ways need mending, and the evidence to that effect was given, of course, in the context of the wife's allegation of this association with another woman, the details of which were first revealed in his cross-examination before the court—an association on which the wife founded her grievance. They go on to say that the wife's complaint of shortage of money was not justified, that she had tacitly admitted that he gave her his wages, and that she gave him money

back. There follows a finding which requires careful consideration:

"We can only reconcile this to the statement—and, indeed, admission—that he was staying out late several times a week, coming in between 3 a.m. and 8 a.m.—by the inference that the wife was not at all averse to his doing so, for it is inconceivable to us that the ordinary wife with such a grievance would continue to put the means into her husband's hands to enable him to carry on his nocturnal habits . . . The intention of the wife has been to coerce her husband against his own wishes, as she well knew, to leave Leeds and live nearer to her relatives in Nottingham. We, therefore, find that there was no intention on the part of the husband to desert his wife. It was not reasonable for the wife to expect her husband to join her in a new matrimonial home at Nottingham, and he was entitled to refuse reconciliation on these grounds."

I pause there to observe that, in my opinion, they are adopting a wrong test. Let it be assumed that the wife would prefer to live in Nottingham near her people rather than in Leeds. To my mind, the real point is that a situation had arisen in which she might be thought to object justifiably to continuing in Leeds, wherever else they might live. Let it be assumed that adultery had not been committed (and it is not found to have been committed), but that an association of an improper character, of which the wife could complain, had been going on, right up to the moment when the wife left home on Dec. 24, with this woman who was still in Leeds at the time of the hearing. To my mind, the question is not whether the wife was entitled to lay down conditions that a resumption of cohabitation must be in Nottingham, but whether she was entitled to say: "I will not go on living with my husband in Leeds while this thing is going on". The justices then say:

"We are satisfied that the break in consortium as it existed during the last two or three months rests with the wife, and her husband's conduct was not such as to compel her to leave the house, nor was his intention to break off matrimonial relations."

In other words, the question of the husband's intention in this matter has been decided adversely to the wife, because they say that it is she who broke up the consortium. I think it right to point out that the next finding was made against the wife without its ever having been put to her at all, so far as I can see. They say:

"The wife had one object in view—the removal of the matrimonial home to Nottingham, which she realised her husband would not consent to. She has not only shown little affection for her husband, but, despite her complaints, has continued to supply him with the wherewithal to carry on his admittedly frequent nightly absences with a view to paving the way to these proceedings, and thereby either (i) securing the removal of the matrimonial home to Nottingham, or (ii) enabling her to obtain an order so that she could return to Nottingham alone and be maintained by her husband. She is therefore not entitled to an order."

I do not ignore that it is a strong thing to differ from any conclusion of justices who have seen and heard the witnesses, but, in my opinion, that inference, which lies at the root of their finding that there was no intention of the husband to desert his wife, is an inference which ought not to have been drawn on the evidence, and is, in my opinion, unjustifiable, the more so as it was never put to the wife. Let it be assumed that she would be glad to live at Nottingham rather than at Leeds; the question still remains whether or not she has ample grounds for wishing not to continue to live in Leeds, where she has been the

victim of a fresh association. But I go further. The suggestion that she has deliberately provided the husband with the means to carry on this association (for that is the implication of what is said), in other words, that she has corruptly connived at the association by providing the means for him to carry it on, for the indirect motive of getting her way about a change in the matrimonial home, seems to me monstrous in the circumstances. I am not prepared to accept that inference as justified. It vitiates the whole conclusion that this husband had no intention to drive his wife away. He was carrying on a clandestine association, to which the wife had every right to object, having regard to the circumstances in which she had taken him back before, and I am not prepared to accept the conclusion, which the justices have founded on the suggestion that she was promoting this association, that this is a case in which it can be said that the husband had no intention to drive his wife away. I appreciate, of course, that her merely telling him, as she did, that if he did not behave better and keep better hours, and the like, she would leave him, does not of itself entitle her to complain of something which is not a just cause of complaint.

But I think that this matter can be tested on authority. Here is a case in which admittedly, as recently as four years ago, an adulterous association with another woman had been condoned. Of course, that adultery could not possibly be the subject of a charge in a court of summary jurisdiction because of the statutory limitation, but I think that what has happened in this case in connection with the fresh association with Mrs. B. might very well be held, in any court in which the matter is open, to have revived the condoned adultery. In *Winscom v. Winscom & Plowden* (1) the headnote reads:

"Semble, condoned adultery may be revived, so as to found a sentence of dissolution, by subsequent misconduct and improprieties, short of, but tending to adultery",

though, in fact, the charge of adultery was found not to be established. It was assumed, though the matter was not subjected to investigation in that case, that the wife had committed adultery some five years before with a man who was not a party to this particular suit. The husband discovered that she was carrying on an association with a second man, but, after going into the question as fully as he could and taking the advice of a senior officer, he came to the conclusion that adultery had not been committed and took his wife back in respect of the second association, and it was with reference to that that SIR J. P. WILDE said (3 Sw. & Tr. 382):

"The petitioner then made the co-respondent promise not to speak to his wife again, and resumed cohabitation with her. He continued from that time to cohabit with her, sleeping in the same bed for upwards of a month. I think it right to pause here, and remark, that if the petitioner had taken a different course, he might probably have entitled himself to relief from the court; for it is alleged that his wife had, in 1853, been guilty of adultery with a person named Clark, which he had condoned. We know nothing of the circumstances, and the fact is proved only by implication. But condonation would hardly have been an answer to a suit founded on that adultery in the face of these familiarities with Lieutenant Plowden, had he not condoned them also. It is not necessary to decide the point; but, as at present advised, I am of opinion that this latter conduct would have enured to revive the original guilt, if that had been made out to the satisfaction of the court."

(1) (1864), 3 Sw. & Tr. 380.



It is important to note that that was not a case of resuming an association with the original adulterer; it was a fresh association of a familiar character, but not established as having included the commission of adultery.

It is only necessary to say that that case has been followed, and, so far as I know, never doubted. It was recently commented on with approval in *Tilley v. Tilley* (1), and I need only read one short passage from the judgment of DENNING, L.J., with reference to resumption or continuance by the wife of an association with the man with whom she had committed adultery. He says:

"The circumstantial details do not matter, but the continuing intimate association does matter. It is one thing to forgive a wife for past adultery when the association is over and done with. It is quite another to forgive her when the association is still continuing. There is little hope of any true reconciliation if a wife, while pleading with her husband to his face for forgiveness, still keeps seeing her lover behind his back. No man can be expected to condone his wife's adultery whilst that is going on. Even if the wife did not actually commit adultery during those three weeks (as to which I say nothing) the intimate association itself was a material fact. Such an association has been held sufficient to revive an antecedent condoned adultery: *Winscom v. Winscom & Plowden* (2); *Ridgway v. Ridgway* (3); *Beard v. Beard* (4); and to justify a husband in separating from his wife, *Glenister v. Glenister* (5)."

In my opinion, the majority of the justices below have completely failed to realise the grave significance of the association with Mrs. B., and when I say "grave" I am not suggesting, and must not be taken to be suggesting, that adultery was actually committed. In my opinion, that is not the point. The point is that a man whose previous adultery had been condoned was, to use the phrase used in the headnote in *Winscom v. Winscom & Plowden* (2), conducting another association with a married woman living separate from her husband "tending to adultery", and, if that sort of thing is sufficient in law to revive condoned adultery, surely it ought to be considered serious enough to justify the wife in withdrawing from cohabitation, and, until that state of things is brought to an end, to found a charge of desertion and to justify her in withdrawing from cohabitation for the purpose of entitling herself to maintenance. In other words, I think that, by finding that it is the wife who broke up the consortium and not the husband, and that, for indirect motives, she actually promoted the association in order that she might take advantage of it, the justices have misdirected themselves in coming to the conclusion that this is a case in which it can truly be said that the husband had no intention to desert his wife. I think that nothing is to be gained by sending the matter back for further investigation, and that we must do that which we are entitled to do, namely, to draw inferences which we think the court below ought to have drawn, and to say that this is a case in which desertion is proved and the wife is also entitled, perhaps even more clearly, to succeed on the charge of wilful neglect to provide reasonable maintenance.

**COLLINGWOOD, J.:** I agree.

*Appeal allowed.*

Solicitors: *Biddle, Thorne, Welsford & Barnes*, agents for *Denis Lyth*, Leeds (for the wife). G.F.L.B.

(1) [1948] 2 All E.R. 1113; [1949] P. 240.

(2) (1864), 3 Sw. & Tr. 380.

(3) (1881), 29 W.R. 612.

(4) [1945] 2 All E.R. 306; [1946] P. 8.

(5) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

COURT OF APPEAL

(SOMERVELL, JENKINS AND HODSON, L.JJ.)

June 23, 24, 1953

BULL v. BULL

*Desertion—House occupied by both parties—Desertion by wife—Return to matrimonial home—No resumption of cohabitation.*

A wife deserted her husband for two periods, in 1946 for approximately six months and in 1947-48 for approximately twelve months. In 1948 she returned at her husband's request to the matrimonial home and subsequently cooked his meals and did occasional mending for him, but otherwise had as little communication with him as possible. There had been no sexual intercourse between the parties since 1936. On Sept. 9, 1952, the husband petitioned for a decree nisi on the ground of his wife's desertion, and he contended that where there had been an initial period of desertion it was no longer necessary to establish that the spouses, while living under the same roof, had done so as two separate households.

HELD: in the circumstances the wife was not in desertion, notwithstanding the periods of desertion by her in 1946 and 1947-48.

*Hopes v. Hopes* (1948) (113 J.P. 10), applied.

*Bartram v. Bartram* (1949) (113 J.P. 422), distinguished.

APPEAL by the husband from an order of His Honour JUDGE HOWARD, sitting as a divorce commissioner, dated Jan. 20, 1953.

The parties were married in August, 1930, and there were two children of the marriage, born in 1931 and 1933. From 1936 onwards there was no sexual intercourse between the parties, who occupied separate bedrooms. In June, 1946, the wife left the matrimonial home and stayed away until Christmas of that year. After she had returned she bought her husband's rations and cooked his meals which usually he had with one of his children, but she had no conversation with him other than to ask him what he would like to eat, and she always refused to go out or have her meals with him. Early in 1947 the wife left the matrimonial home again and remained away for about twelve months. In 1948 she returned at her husband's request and they resumed a relationship similar to that which they had had after the wife's return in 1946. By his petition, which was undefended, the husband sought a decree nisi for divorce on the ground of his wife's desertion, but the learned commissioner dismissed the petition.

*Loudoun* for the husband.

The wife was not represented.

SOMERVELL, L.J., stated the facts and continued: The petition is dated Sept. 9, 1952, and the relevant three years from that date take us back to Sept. 9, 1949. During the whole of that period the husband and the wife have been living under the same roof in the circumstances which have been described. The learned commissioner was not satisfied that the husband had made out a case of desertion. Counsel for the husband did not suggest that the circumstances in which the parties were living under the same roof would justify us in coming to the conclusion that there was no longer one household but two households, to use a phrase taken from the judgment of DENNING, L.J., in *Hopes v. Hopes* (1). *Prima facie* if a husband and wife are living under one roof, neither can say that the other has deserted, although, of course, there may be limitations and restrictions on the normal and ideal marriage relationship which make it very far from a full or satisfactory marriage. *Hopes v. Hopes* (1) shows that where the parties are living under the same roof it must

(1) 113 J.P. 10; [1948] 2 All E.R. 920; [1949] P. 227.

be established that they are living as two households in order for one to succeed on a petition for desertion. It is not suggested that the circumstances which prevailed throughout the whole of the three years prior to the petition in the present case would justify any such finding.

It was, however, submitted by counsel that the test is entirely different if there has been an initial desertion, that is to say, an initial period where one party has been away from the matrimonial home in circumstances in which the court would hold that there had been desertion during that period. He relies for that principle on *Bartram v. Bartram* (1) where a wife had deserted her husband for some years. She then had to leave the house where she was, and there was nowhere else where she could go except to the house where her husband was living. Although one gathers that when she went there there were not two separate households as in *Hopes v. Hopes* (2), it was held that her presence under that roof did not stop the desertion running. The question is whether that decision was based on the principle for which counsel contends or whether it was based on some narrower ground. Undoubtedly, there are words in the judgment of DENNING, L.J., which at any rate tend to support the wider principle for which counsel contends. He said:

"Once the period of desertion has begun to run, it does not cease to run simply because the parties attempt a reconciliation and for that purpose come together again for a time",

and he refers to *Mummery v. Mummery* (3). Speaking for myself, I think *Mummery v. Mummery* (3) and *Perry v. Perry* (4), where it was held that occasional acts of sexual intercourse may not, having regard to the circumstances in which they take place, prevent the period of desertion running, do not assist in the present case. BUCKNILL, L.J., in his judgment, refers (and, if I may say so, with respect, rightly refers) to the fact that actual desertion by the wife had been established for many months. He said:

"The wife does not suggest for one moment that she brought it [her desertion] to an end. The question is: Do the facts proved establish that it was brought to an end? In my view, it can only be brought to an end if the facts show an intention on the part of the wife to set up a matrimonial home with the husband. If the facts do not establish any intention on the part of the wife to set up a matrimonial home, the mere fact that, as a lodger, she went to live under the same roof as her husband, because she had nowhere else to go, does not remove the desertion which she had already started and which continued to run."

ASQUITH, L.J., regarded the case as a border-line case of very great difficulty. I think it is clear from his judgment that he found it possible to hold that the desertion had not been interrupted simply because the wife was not a free agent, but was acting under the spur of necessity in returning to live under the same roof.

If I am right in thinking that that was the ratio of those two decisions, the cases differ completely from the present case where the wife was under no spur of necessity, but came back, indeed, at the request of the husband. All this happened before the material three years, and there is force in the consideration which the learned commissioner had in mind that the husband asked her to

(1) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

(2) 113 J.P. 10; [1948] 2 All E.R. 920; [1949] P. 227.

(3) [1942] 1 All E.R. 553; [1942] P. 107.

(4) 116 J.P. 258; [1952] 1 All E.R. 1076; [1952] P. 203.

return knowing what had been the previous relationship but with the hope that that relationship would improve. Therefore, I do not think that *Bartram v. Bartram* (1) supports the wide proposition for which counsel contended, nor do I think in principle that any such proposition could be accepted or laid down. We are dealing simply with the present case and in the present case during the relevant three years the parties were living under the same roof as part of one household. Periods of physical desertion prior to the three years may in certain circumstances be relevant in considering the issue, but in the present case I do not regard them as establishing that during those three years there had been desertion when plainly, applying the normal "one roof" principle, it is not open to the husband to say that his wife had deserted him. For these reasons I think the learned commissioner came to a right conclusion and I would dismiss the appeal.

**JENKINS, L.J.:** I agree. Where one spouse presents a petition for divorce on the ground of desertion by the other and it appears that during the period of alleged desertion the parties have been living under the same roof, the question at once arises whether during that period the allegedly deserting spouse was still in desertion. I think one may say that *prima facie* the fact that they have been living under the same roof is a circumstance against the view that there has been continuous desertion. Nevertheless, that circumstance is not necessarily fatal, as appears from *Bartram v. Bartram* (1), where, in the circumstances of that case, this court came to the conclusion that the period of desertion had not been interrupted by the time during which the wife was living under the same roof as the husband. My Lord has referred to the facts in *Bartram v. Bartram* (1), which show that there were many years of desertion during which the wife lived in a different house from the husband. Her residence in that house, which belonged to the husband, was put an end to by the husband's selling it with a view to forcing her to come and live with him. There was no house other than the one occupied by the husband in which she could live consistently with her continuance in the employment in which she was engaged. She, therefore, against her will went and lived in the same house as the husband. The terms on which she lived in the house were that she refused to sleep with the husband and slept with the adopted daughter of her husband's mother. She never went into his rooms, and she paid no attention at all to him as a husband, never mended his clothes, cooked for him, or went out with him. She never treated him in any way differently from the way she would treat a lodger whom she disliked. At times, however, she sat at the same table with her husband and ate the common food provided for them.

Those were the facts to which the decision in *Bartram v. Bartram* (1) was addressed, and we are now asked to apply the principle said to be deducible from that case to the very different facts of the present case. In the present case there were two periods of what may be described as actual desertion by the wife, one from June, 1946, for a matter of six months, and the other from the spring of 1947 for a matter of twelve months. Ever since the end of the latter period the parties had, in fact, been living under the same roof. The petition was presented on Sept. 9, 1952, so that the last period of actual desertion was some four and a half years before the presentation of the petition. As to the circumstances in which the husband and wife had been occupying the same house since the end of the second period of actual desertion, it appears that there had been no sexual intercourse since about 1936 (which was, of course, before the first period of actual desertion), and that the wife cooked meals

(1) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.



for the husband and occasionally did mending for him, though not often, but, so far as she could while living in the same house, she arranged to see as little as possible of him. The two children of the marriage came and stayed for their holidays from time to time in the house, but the family, apparently, never had meals together. The conditions in which the parties have been living for many years now are certainly unsatisfactory and uncomfortable from the husband's point of view and I share the sympathy expressed for him by the learned commissioner. Nevertheless, it would, in my view, be difficult on the evidence to hold that there were here two separate households. The circumstances relied on in support of that view are weaker than those in *Bartram v. Bartram* (1), and the element of compulsion on the wife to live under the same roof as the husband, which was a decisive factor in that case, is wholly absent here. I think the parties must be taken to have been living in one and the same household on the facts of this case, albeit it was not the kind of household normally kept by a happily married couple. Having lived with his wife on the same terms for some four and a half years preceding the presentation of the petition, the husband now says that on the strength of the initial actual desertion in 1946 the wife has ever since been in desertion from him. In my view, so to hold in the circumstances of this case would be an unwarrantable extension of the decision in *Bartram v. Bartram* (1). I agree with my Lord that on the facts of this case the learned commissioner came to a right conclusion in holding as he did that the requisite period of desertion had not been made out. Accordingly, I would dismiss the appeal.

HODSON, L.J.: I agree.

*Appeal dismissed.*

Solicitors: *Gedge, Fiske & Co.*, agents for *A. E. Floyd & Co.*, Dunmow, Essex (for the husband). G.F.L.B.

(1) 113 J.P. 422; [1949] 2 All E.R. 270; [1950] P. 1.

## PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

June 26, 1953

BUTTLE *v.* BUTTLE

*Husband and Wife—Maintenance—Amount—Serving soldier.*

A Home Office circular sent to clerks to justices stated, *inter alia*, that, in assessing a soldier's income in order to fix the amount of a maintenance order against him, it would be proper to take into account his pay, the amount of the marriage allowance, and the fact that in addition to receiving pay a soldier was normally clothed, fed and lodged at the public expense. The circular set out in an appendix the minimum amount which in relation to any particular soldier would normally be received by a wife by way of allotments and allowance, and stated that: "10... In the absence of private income of either the husband or the wife the court should take the figure so arrived at as a general guide to a minimum amount for the maintenance order. 11. Where either the husband or the wife has other sources of income these should be taken into account in fixing the amount to be paid under a maintenance order. There will, no doubt, be cases in which a wife is in employment and may be earning a considerable wage. In any case of this kind, however, allowance should be made for the value of the issues in kind received by the soldier in order to maintain the proper balance between the respective incomes of the parties." The husband was a corporal in the Royal Horse Guards. He made an allotment of

£1 8s. per week to the wife, and she had a marriage allowance of £2 9s. per week, making a total of £3 17s. The wife also earned £6 10s. per week. On a summons by the wife under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging the husband with desertion the husband admitted desertion, and the justices, purporting to act in accordance with the advice contained in the circular, awarded the wife £3 17s. per week as maintenance. On appeal by the husband,

**HELD:** while, if the amount had been fixed strictly in accordance with the circular, but had been fixed on a wrong basis, compliance with the circular would of itself be no justification, the justices had purported to follow the advice contained in the circular, but had misunderstood or misapplied it, for they had ignored the wife's earned income, and, therefore, they had misdirected themselves and the case must be sent back for further consideration.

**Per LORD MERRIMAN, P.:** If it is intended to convey, as might be thought from a literal reading of para. 11 of the circular, that it is only in cases where the wife has a separate income, either by her own earnings or otherwise, that the advantages to the husband of what are called the "issues in kind" should be taken into account, I should differ. These calculations should always be made in assessing the husband's means, and not only in cases of which it can be said that they are necessary to counter-balance some private income of the wife's.

**APPEAL** by the husband against the amount of a maintenance order made in favour of the wife on Feb. 24, 1953, by the Domestic Proceedings Court sitting at Chelsea (constituted under the Metropolitan Police Courts (Domestic Proceedings) Order, 1952 (S.I., 1952, No. 1860), being a court of summary jurisdiction "for the city of London and that part of the metropolitan police court area as is for the time being assigned to the Bow Street and West London police courts for the purpose of the hearing and determination of domestic proceedings.")

The husband was a corporal in the Royal Horse Guards, and by his making an allotment of £1 8s. per week to his wife, she qualified for the marriage allowance of £2 9s. per week, making a total of £3 17s. per week. The wife having issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging the husband with desertion, the husband admitted desertion and the wife admitted that she was earning £6 10s. per week. Purporting to act in accordance with a Home Office circular (H.O. 259/52) entitled "Enforcement of Maintenance Orders and Affiliation Orders against members of Her Majesty's Forces other than Commissioned Officers", the justices awarded the wife £3 17s. per week as maintenance. The husband appealed on the question of the amount awarded.

*Coodo* for the husband.

*S. H. Noakes* for the wife.

**LORD MERRIMAN, P.,** stated the facts and continued: In their reasons the justices, the chairman of whom was one of the learned metropolitan magistrates, say that the desertion was, not only proved, but actually admitted by counsel for the husband, and they go on to say:

"The amount of the order is the amount the wife normally received or would normally receive by way of qualifying allotment and married allowance if the parties were not estranged from each other, and is, in fact, the amount she had been receiving."

So the question whether it is a mere coincidence that the amount of the order equals the combined amount of the allotment and the married allowance is put beyond the slightest doubt. It was deliberate. They continue:

"This is in accordance with the advice given to clerks to justices by the Home Office in their circular letter . . . of Dec. 1, 1952, as to the

arrangements made by the service departments with regard to separated wives of members of the forces."

I pause there to observe that, even if the amount had been fixed strictly in accordance with the circular, but had been fixed on a wrong basis, the compliance with the circular would of itself be no justification. The justices would not be entitled to shelter behind advice or directions given by a government department if that advice were demonstrably wrong, for then they would plainly have misdirected themselves. But if the advice has been misunderstood, and, while purporting to follow the advice, the court has in truth and in fact not followed it, but has thought that it was following it, plainly there is a misdirection of itself by the court, and the matter is open to review by the appellate tribunal.

That brings me to the relevant paragraphs of the circular. Paragraph 8 refers to the subject of estrangement, and para. 9 reads:

"In assessing a soldier's income in order to fix the amount of a maintenance order it would be proper to take into account the following items."

Nobody can take exception to that wording. The first item is the soldier's pay, which is stated at the lowest rate; the next is the amount of the married allowance which would be payable if normal domestic relations existed between the parties, which is obviously a matter properly to be taken into account; and, thirdly, is the fact that in addition to receiving pay a soldier is normally clothed, fed and lodged at the public expense, or else receives a cash allowance in lieu in special cases. There is a note to that item:

"It is impossible, however, to ascribe an accurate cash value to the food, clothing and lodging provided, and it would, therefore, be for the court to decide the value to be placed on issue in kind in each particular case."

I think it is impossible to take exception to that as a statement of the general principles. It happens to coincide, in effect, with something I am reported as having said in this court ([1943] 2 All E.R. 476) in *Collins v. Collins* (1), in connection with a maintenance order made against an officer in the forces which PEARCE, J., tells me is constantly followed as a matter of practice by the registrars in similar cases. Paragraph 10, which has been criticised, reads:

"From the particulars given in appendix (A) the court should be able to ascertain in relation to any particular member of the forces the minimum amount which would normally be received by the wife by way of allotments and allowance if the parties were not estranged from each other."

That is perfectly clear and accurate, and the figures in this case are the qualifying allotment of the sum of £1 8s., which attracts the marriage allowance of £2 9s. The words "minimum amount" are used because there is nothing in these schedules to prevent a man from making a voluntary allotment in addition to the compulsory qualifying allotment. But the sentence then continues in these words:

"In the absence of private income of either the husband or the wife the court *should* take the figure so arrived at as a general guide to a minimum amount for the maintenance order."

I am bound to say that I think that that sentence is subject to the criticism

that it appears to be an attempt by a government department to dictate to a court how it should decide the question of the amount of a maintenance order, and I deprecate any such attempt. Obviously, a slight modification of the words would meet that difficulty. It is a difficulty which confronts judges every day of the week in addressing juries on matters which are peculiarly within the province of the jury and not of the judge, and I do not think that it is necessary for us to substitute any particular formula for that which has here been adopted. But, as it happens, if it is to this particular paragraph, as it obviously is, that the learned chairman is referring in the statement of the reasons, the decision is not in accordance with the advice, because the advice that the court should take the figure so arrived at as a general guide to the minimum amount for the maintenance order is qualified by the statement that this is "in the absence of private income of either the husband or the wife", and it is clear that the wife in the present case has a gross income of £6 10s. a week. Be it said at once that that sum has never been analysed so as to show what spending money she really has out of it, or anything of that sort, but that she has a private income by her own exertions of £6 10s. a week was common ground.

I should like to make another observation on this circular. Paragraph 11 reads:

"Where either the husband or the wife has other sources of income these should be taken into account in fixing the amount to be paid under a maintenance order. There will, no doubt, be cases in which a wife is in employment and may be earning a considerable wage. In any case of this kind, however, allowance should be made for the value of the issues in kind received by the soldier in order to maintain the proper balance between the respective incomes of the parties. Regard should also be had to any allowance received by the wife under the provisions of the Family Allowances Act, 1945."

As a direction that all sources of income should be taken into account in making the assessment, I have nothing to say by way of criticism of that, but if it is intended to convey, as might be thought from a literal reading of the paragraph, that it is only in cases where the wife has a separate income, either by her own earnings or otherwise, that the advantages to the husband of what are called the "issues in kind" should be taken into account, I should differ, because in any event, in my opinion, the fact that in addition to his pay the husband receives his food, his clothing (or some of his clothing, at any rate), and his quarters free, is a matter to be taken into account, if for no other reason because, putting it generally, it leaves his pay more or less without deduction for his own spending purposes. I am not intending that to be taken literally, because one knows that there are certain necessary expenses—for extra messing, games, and the like—which, no doubt, also ought to be taken into account in assessing his receipt of pay in cash, and other benefits in kind. These calculations should always be made in assessing the husband's means, and not only in cases of which it can be said that they are necessary to counter-balance some private income of the wife's.

It seems to me that there is only one conclusion to which this court can come, viz., that the justices have erred by purporting to follow the advice given in a circular, which is not in itself wholly accurate, and having, in fact, misunderstood or misapplied that advice. That, as I have already indicated, plainly involves the result that they have misdirected themselves, and, therefore, although this court



does not interfere with mere questions of amount, it seems to me that this is clearly a case in which there is an error in principle, and the matter must be sent back for further consideration.

PEARCE, J.: I agree.

*Order accordingly.*

Solicitors: *Frank Taylor, Nightingale & Baker*, Putney (for the husband);  
*Watson, Sons & Room* (for the wife).

G.F.L.B.

### COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 6, 1953

REG. v. SIMONS

*Criminal Law—Sentence—Offence triable on indictment only at election of accused—  
No clear evidence of election—Procedure to be followed.*

*Criminal Law—Sentence—Outstanding offence—Offences inappropriate to be  
considered.*

Where a prisoner has been committed for trial for a summary offence which is triable on indictment only at the prisoner's election, and there is a doubt whether he has exercised that election, the committal cannot be quashed. The proper course is to include in the indictment a count for that offence, and, if it is not established that the prisoner has exercised his election, the court should quash the count.

A court, when passing sentence on conviction of an offence, should not take into consideration (a) any offence which the court itself has no jurisdiction to try; (b) an offence in relation to the driving, insurance or otherwise of a motor vehicle. The last-mentioned offences should be prosecuted separately, as the Road Traffic Acts contain special provisions relating to the indorsement of licences and disqualifications which can follow only on conviction.

#### APPLICATION for leave to appeal against sentence.

On Apr. 16, 1953, the applicant, Kenneth Alfred Simons, was charged at Leicester City Quarter Sessions with taking and driving away a motor vehicle without the owner's consent (contrary to the Road Traffic Act, 1930, s. 28 (1)), dangerous driving, storebreaking, and larceny. He pleaded Guilty to taking the vehicle, to receiving, and to dangerous driving, and was sentenced to three years' corrective training. One other offence of driving while disqualified was taken into consideration.

No counsel appeared.

LORD GODDARD, C.J., delivered the judgment of the court in which he stated the facts and continued: It is with regard to the offence that was taken into consideration that this court desires to make a comment, because we are not giving leave to appeal. The applicant had also been charged when before the magistrates with driving a motor vehicle while disqualified, which is a summary offence punishable with six months' imprisonment under the Road Traffic Act, 1930, s. 7 (4). The applicant was committed for trial by the magistrates for driving while disqualified, but he could only be tried on indictment for that offence if he claimed the right to be tried by a jury under the Summary Jurisdiction Act, 1879, s. 17 (1) (now the Magistrates' Courts Act, 1952, s. 25 (1)), which provided that, if a person is liable to be sentenced to more than three months' imprisonment, he can elect to be tried by a jury. When the case

came before quarter sessions, the applicant was not indicted for that offence because there seemed to be some difference of opinion whether or not he wished to be tried by a jury, and the learned recorder was asked to quash the committal. I do not know how you quash a committal, and I do not think you can. The only thing the court can do is to quash the relevant count in the indictment. As he had been committed for trial, and as there was a doubt whether he had elected to go for trial, it would have been better in the circumstances to have included a count for that offence in the indictment. If he had been indicted, as he ought to have been, evidence could have been given whether or not he had elected to go for trial by calling the magistrates' clerk, and, if the recorder had come to the conclusion that he had not elected to go for trial, he could have quashed the count. After the conviction of the other offences, the recorder took into consideration this offence of driving while disqualified. There are two objections against doing that. The first is that, if quarter sessions have no power to try the offence, they cannot take it into consideration when passing sentence for another offence. Secondly, this court has laid down in unmistakable terms in *Rex v. Collins* (1) that offences in relation to the driving of motor cars ought not to be taken into account in any court where there is a conviction of some other offence, for the reason that there are special provisions in the Road Traffic Act, 1930, s. 7 and s. 8, with regard to indorsement of or disqualification for holding a licence, and the disqualification or the indorsement can only follow on a conviction. When the court says it takes a matter into consideration, that does not amount in law to a conviction. The court would like to repeat (i) that, if a court has no jurisdiction to try a particular offence, it ought not to take that offence into account when passing sentence for an offence which it has power to try, and (ii) that offences against the Road Traffic Acts in relation to the driving, insurance, or otherwise, of motor vehicles, ought not to be taken into account when sentence is being passed for other offences, but should be prosecuted separately because the law requires magistrates to take certain steps with regard to indorsement or disqualification for holding a licence which can only be taken if there is a conviction. But there is no ground for interfering with the sentences passed in this case and, therefore, this application for leave to appeal is refused.

*Application dismissed.*

(1) 111 J.P. 154; [1947] 1 All E.R. 147; [1947] K.B. 560.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 14, 1953

DIRECTOR OF PUBLIC PROSECUTIONS v. ROGERS

*Criminal Law—Indecent assault—Child—Persuasion by father to handle him indecently—No compulsion or force—No acting in hostile manner.*

On two occasions the respondent, when alone in his house with his daughter aged eleven, put his arm round her shoulders, led her upstairs, and there persuaded her to masturbate him. He used no force or compulsion, and the child did not object or resist, though on the second occasion, knowing the nature of his intention, she did not wish to accompany him upstairs, but submitted to do so. Justices dismissed informations charging the respondent with indecent assault on his daughter on each occasion.

HELD, that, as the respondent had not used compulsion or force and had not acted in a hostile manner towards the child, he had not committed an assault, and, consequently, had not committed an indecent assault, on her, and the justices had, therefore, come to a right decision.

*Fairclough v. Wiipp* (1951) (115 J.P. 612), applied.

CASE STATED by Kent justices.

At a court of summary jurisdiction sitting at Hythe on Jan. 13, 1953, the appellant, the Director of Public Prosecutions, preferred two informations against the respondent, charging that on two occasions between Oct. 27, 1952, and Nov. 7, 1952, he indecently assaulted at Hythe, Beryl Cissie Caroline Rogers, his daughter, then aged eleven years, in each case contrary to the Offences against the Person Act, 1861, s. 52.

It was proved or admitted that the respondent at all material times lived with his wife and daughter. On two occasions between Oct. 27, 1952, and Nov. 7, 1952, he put his arm round his daughter's shoulders and led her upstairs. She made no objection or resistance, and no force or compulsion was used. He then exposed his person to the child and told her to masturbate him. On both occasions the child obeyed him although she did not wish to do so. On both occasions he was alone in the house with the child. On the first occasion he committed the indecent conduct on the landing and on the second occasion in his bedroom. On both occasions when he put his arm round his daughter's shoulders he did so to lead her upstairs, intending to conduct himself indecently towards her. On the first occasion the child neither minded nor objected to his putting his arm round her shoulders, but on the second occasion, knowing the nature of his intention towards her, she did not wish to accompany him upstairs, but, nevertheless, she neither objected nor resisted, but submitted to his request.

It was contended on behalf of the appellant that the placing of the respondent's arm round the child's shoulders could be an assault, and, in the absence of consent by the child, would be an assault. As there were circumstances of indecency accompanying this act, the child could not consent to it, and, therefore, the justices could hold that he had assaulted her. The facts, as proved, disclosed more than a mere invitation by the respondent to touch his person. Apart from these contentions, it was further contended that an assault could be inferred from the particular circumstances of the case, in that on both occasions the child was alone in the house with the respondent, she was ordered by him with all the weight of parental authority to masturbate him, her touching his person was an involuntary act by reason of his exercising his parental authority, and that all these facts could, and did, constitute an assault, having regard to her age.

It was contended on behalf of the respondent that there was no case for him to answer on the grounds (i) that the acts of masturbation were invitations made by him to his daughter to touch his person, which alone could not constitute an assault on her, and (ii) that a hostile act was a necessary ingredient of an indecent assault on a child under sixteen years of age, and no evidence had been adduced of any such hostile act since the placing of his arm round her shoulders was an entirely separate transaction from the subsequent indecency and was not an assault because it was not a hostile or unfriendly act, even if (which was denied) it formed one transaction with the subsequent indecency.

The justices dismissed the informations and the appellant appealed.

*J. M. G. Griffith-Jones* for the appellant.

*Collard* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Kent sitting at Hythe, before whom the respondent was charged with an indecent assault on his daughter, aged eleven. [His LORDSHIP stated the facts and continued:] Before it can be found that a man has been guilty of an indecent assault, it has to be found that he was guilty of an assault, for an indecent assault is an assault accompanied by indecency, and, if it could be shown here that the respondent had done anything towards this child which, by any fair use of language could be called compulsion, or had acted, as I have said in other cases, in a hostile manner towards her—that is, with a threat or a gesture which could be taken as a threat, or by pulling a reluctant child towards him—that would, undoubtedly, be assault, and, if it was accompanied by an act of indecency, it would be an indecent assault.

The first case to which we were referred, *Beal v. Kelley* (1), was quite different from the present matter because there the defendant exposed himself to a boy and asked the boy to handle him, and, when the boy refused to do so and began to go away, the defendant ran after him, took hold of him, and pulled him towards him. There can be an assault without battery, and in that case there was, undoubtedly, an assault because the boy wanted to get away from the disgusting behaviour. The assault was accompanied by indecency, and, therefore, there was an indecent assault. That case must be compared with *Fairclough v. Whipp* (2), where the respondent exposed himself in the presence of a girl aged nine, saying: "Touch it", which she did. We had to hold that that was not an indecent assault because there was no authority which said that where one person invites another to touch him that can amount to an assault on the person invited.

I think that the justices were right in saying that, in principle, they could not distinguish the present case from *Fairclough v. Whipp* (2). There might be a case in which the evidence showed that what was done was against the will of the child, but, as the respondent used nor compulsion, no force, on the child to go upstairs, however much we may regret that we cannot punish him for doing an act which deserves the reprobation of every decent man, we feel that the only thing we can do is to say that the justices came to a right decision and reluctantly dismiss this appeal.

**PARKER, J.:** I feel constrained to agree, but with extreme reluctance.

**DONOVAN, J.:** I agree.

*Appeal dismissed.*

Solicitors: *Director of Public Prosecutions* (for the appellant); *G. F. Hudson, Matthews & Co.*, agents for *Frederic J. Hall*, Folkestone (for the respondent).

T.R.F.B.

(1) 115 J.P. 566; [1951] 2 All E.R. 763.

(2) 115 J.P. 612; [1951] 2 All E.R. 834.



QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 15, 1953

REG. v. NAILSWORTH LICENSING JUSTICES. *Ex parte* BIRD

*Justices—Bias—Licensing—Petition for licence signed by justice—Objection taken after decision to grant licence announced.*

At the hearing by a licensing committee of an application for an off-licence a petition in favour of the licence was admitted in evidence, after an objection by an opposing licensed victualler's association had been overruled. The petition was not read out in court, nor was it inspected by the justices, but after they had retired to consider their decision it was observed that the petition had been signed by one of the justices. After the justices had returned into court and announced their decision to grant the licence, the solicitor for the opposing association called the justices' attention to the fact that the petition had been signed by one of their number. The two other justices then retired, but on their return they declined to alter their decision. On a motion for an order of certiorari to quash the justices' decision,

HELD: that certiorari must be refused on the grounds (i) that it had not been established that there was any real bias on the part of the justice who had signed the petition, or anything which could make it appear improper, as distinct from merely undesirable, for her to sit; (ii) that the objection could, and should, have been made before the justices announced their decision.

MOTION for an order of certiorari.

An application was made to the licensing committee of the Nailsworth division of Gloucestershire by one Francis Adlington Stokes, a director of Joseph Burton & Sons, Ltd., for a beer off-licence in respect of Price's Stores at Nailsworth. The application was opposed by the applicant for certiorari, Harold Bird, a licensee and the secretary of the Stroud and District Licensed Victuallers' Association and Protection Society.

The committee was composed of three justices, including one Alice Waine. At the hearing of the application a petition in favour of the licence was produced by the manager of Price's Stores, and the solicitor for the applicant objected that it was not admissible in evidence. The objection was overruled, but the petition was not read out to the court nor handed up to the justices for their inspection. After the justices had retired to consider their decision it was observed that Alice Waine had signed the petition in favour of the licence. The justices returned and announced that the licence was granted. The solicitor for Harold Bird thereupon objected that Alice Waine had both signed the petition and sat as a member of the committee. The two other justices then retired and on their return stated that the committee's decision had been given and could not be changed.

On Apr. 14, 1953, the applicant gave notice of the present motion for an order of certiorari to quash the grant of the licence on the ground that an adjudicating member of the licensing committee was biased in that she had signed the petition which had been put in as evidence, so that justice was not seen to be done. The said Alice Waine stated in her affidavit that on the day before the proceedings before the licensing committee she was requested to take the place on the bench of other justices who were unable to attend the court next day; that she was not informed that any licensing application was due to be heard and she was not given details of the court's list for that day; that, until the objection was made, she did not remember that she had signed the petition which she had signed some weeks before the date of the hearing when she was shopping in Price's Stores; that she had not told the other two justices that she had signed it; that

she had never, at any time, any interest in granting or refusing the application, but she knew that Price's Stores bore a good reputation and was convinced that the licence applied for would be desirable for the benefit of the neighbourhood, and that the applicant for the licence had made out a need for such a licence which would enable beer to be delivered to persons living in country districts in their own homes, whereas otherwise it might be impossible or inconvenient for them to visit licensed premises for the purpose of buying beer.

*Fearnley-Whittingstall, Q.C., and E. B. C. Clifford* for the applicant for certiorari.

*Gage* for the justices.

**LORD GODDARD, C.J.**, stated the facts and continued: It is, of course, undesirable that a justice should sit and adjudicate on a matter in favour of which he has previously signed a petition. No one, however, suggests that Mrs. Waine was conscious about this matter when she came to the court, and I am not attaching any blame to her. She was asked in an emergency to sit on the committee, but it is said that justice was not seen to be done because the parties found out, while the justices were out of court in their own room, that she had signed this petition. It is obvious from the affidavit of the acting clerk to the justices, who did not happen to be the regular clerk of the court, that, while the justices had retired, a member of the licensed victuallers' association, which was opposing this application, called their solicitor's attention to the fact that the name of Mrs. Waine was on the petition and that she had been sitting. The solicitor did not make any objection then. The justices were out of the court, and, if he had wanted to make an objection, I am satisfied from the clerk's affidavit that he could have said: "We are going to object to Mrs. Waine. We find she signed this petition". He did not make an objection either then or when the justices came back and before they announced their decision. I think it is clear that he let the matter go on, saying to himself: "Here we have an opportunity of getting this order quashed if they find in favour of the application, and, of course, if they do not find in favour of the application, well and good". I think that would be a complete answer to the present application, for certiorari is a discretionary remedy where the justices have acted within their jurisdiction.

But the more important point is whether or not we are bound to quash this order on the ground of bias simply because Mrs. Waine had signed this petition. I do not in the least want to depart from what my predecessors have said on the subject because it is most important that justice should be seen to be done. Objection cannot be taken to everything which might raise a suspicion in somebody's mind—as *DAY, J.*, said in *Reg. v. Taylor, etc., JJ. & Laidler. Ex p. Vogwill* (1): "anything at any time which could make fools suspect". It is not something which raises doubt in somebody's mind that is enough to cause an order or a judgment of justices to be set aside. There must be something in the nature of real bias. The fact that a person has a proprietary or a pecuniary interest in the subject-matter before the court which he does not disclose has always been held to be enough to upset the decision of the court, but merely that a justice may be thought to have formed some opinion beforehand is not, in my opinion, enough to do so. Licensing matters are left by Parliament to justices for the very best of reasons—that justices have local knowledge—and it is impossible to suppose that any justice who sits on a licensing committee knowing that there is an application for a licence or opposition to the renewal

(1) (1898), 14 T.L.R. 185.

of a licence has not got his own view as to the grant or refusal of the licence. The anomaly has often been pointed out that whereas a person interested in a brewery may not sit as a licensing justice, a person who is a very active teetotaler may do so, but it cannot be said, if an application is refused, that the justice necessarily acted improperly because he happened to be a total abstainer. In all these cases it must be a question of degree.

Our attention has been called to *Rex v. Caernarvon Licensing JJ. Ex p. Benson* (1), in which the court, consisting of myself and HILBERY and BIRKETT, JJ., granted an order of certiorari to set aside a refusal of justices. In that case one of the justices was a deacon of a chapel which had called a meeting for the express purpose of considering whether the licence should be opposed, and although the justice did not actually vote at the meeting, he took part in it. In that case we thought that a justice who had practically made himself a party to the body which was going to oppose the licence should not sit on the bench. In the present case, on the other hand, a justice at some time—it is not clear when—when entering a grocer's shop signed a petition which indicated that she thought an off-licence would be justified. We do not think that in those circumstances we ought to say that she was so biased that she was unfit to sit on the bench. She was perfectly entitled to tell anybody: "I think Mr. Jones might very well have a licence", or "I think it would be a convenience to the neighbourhood if there was a licence here".

Having carefully considered the affidavits, we refuse the order on two grounds—(i) because we do not think it was established that there was any real bias on the part of this justice or that there was anything done which would make it appear improper, and not merely undesirable, for her to sit (and we have no reason to suppose that she would have signed this petition if she had known she was going to sit); (ii) because we think there was ample opportunity for any objection to have been made before the decision was given. For those reasons, we refuse the application.

PARKER, J.: I agree.

DONOVAN, J.: I also agree.

*Application refused.*

Solicitors: *Speechly, Mumford & Craig*, agents for *Little & Bloxam*, Stroud (for the applicant); *Gustavus Thompson & Sons*, agents for *Scott & Fowler*, Gloucester (for the justices).

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 16, 1953

POPE v. CLARKE

*Road Traffic—Dangerous driving—Notice of intended prosecution—Time of alleged offence incorrectly stated—Notice not invalidated—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 21 (c).*

At about 11.15 a.m. on Dec. 4, 1952, a motor car driven by the respondent was involved in a collision with a lorry. Notice under s. 21 (c) of the Road Traffic Act, 1930, of an intended prosecution for dangerous driving was sent to the respondent by registered post. The notice stated correctly the intended charge and the date and place of the alleged offence, but incorrectly stated the time as "1.15 p.m." Justices dismissed an information against the respondent for dangerous driving on the ground that the notice did not comply with s. 21 (c) of the Act.

HELD: that the provision with regard to the specification of the time of the alleged offence being only directory and not mandatory, and the purpose of the notice being to call the respondent's attention, while the circumstances of the offence were still fresh in his mind, to the fact that he was to be prosecuted, the justices were wrong in holding that the incorrect statement of the time of the alleged offence invalidated the notice, and the case must be remitted to them to hear and determine.

Dictum of LORD COLERIDGE, C.J., in *Woodward v. Sarsons* (1875) (L.R. 10 C.P. 733, 746) applied.

## CASE STATED by Essex justices.

At a court of summary jurisdiction sitting at Brentwood on Jan. 29, 1953, the appellant, Walter Steven Pope, a superintendent of police, preferred an information against the respondent, Harry William James Clarke, charging that, on Dec. 4, 1952, on a road at Great Warley, Essex, he unlawfully drove a motor vehicle in a manner dangerous to the public having regard to all the circumstances of the case, contrary to the Road Traffic Act, 1930, s. 11 (1).

It was proved or admitted that on Dec. 4, 1952, at about 11.15 a.m., a collision occurred on the road leading from Brook Street, Brentwood, to Ingrave at Mascalls Lane, Great Warley, at the junction with Warley Hill, between a motor car, driven by the respondent, and a motor lorry. The appellant alleged that the circumstances of the respondent's driving immediately before the collision constituted the offence to which the information related. The respondent was not warned at the time of the alleged offence that the question of prosecuting him for an offence of reckless, dangerous, or careless driving would be taken into consideration, and the summons for the alleged offence was not served on him within fourteen days of the commission of the alleged offence, but a notice of intended prosecution was sent to him by registered post in accordance with the Road Traffic Act, 1930, s. 21 (c).

It was contended on behalf of the respondent that the provisions of the Road Traffic Act, 1930, s. 21 (c), stipulated that the notice of intended prosecution must specify, *inter alia*, the time at which the offence was alleged to have been committed, that those provisions must be strictly complied with, that that had not been done because the time of the alleged offence was proved to have been at or about 11.15 a.m. on Dec. 4, 1952, whereas the notice stated it as 1.15 p.m., and that, therefore, the notice was invalid and the information bad. It was contended on behalf of the appellant that the time was sufficiently specified in the notice by the statement of the date, namely, Dec. 4, 1952, the statement of the hour being unnecessary and superfluous, and that the purpose of the notice, *viz.*, to call the respondent's attention to the time and circumstances in respect



of which he might be charged, had been fulfilled, and the requirements of the Road Traffic Act, 1920, s. 21 (c), had been substantially and sufficiently complied with; and therefore, the notice was adequate and valid.

The justices dismissed the information and the appellant appealed.

*Moules* for the appellant.

*Jellinek* for the respondent.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the county of Essex, before whom the respondent was charged with the offence of driving a motor vehicle in a manner dangerous to the public, contrary to the Road Traffic Act, 1930, s. 11 (1). [His LORDSHIP stated the facts and continued:] By some mistake the police put in the notice 1.15 p.m. instead of 11.15 a.m. The notice stated:

"... I hereby give you notice that it is intended to institute proceedings against you in respect of an offence under s. 11 of the Road Traffic Act, 1930, the particulars being that, at or about 1.15 p.m. on Thursday, Dec. 4, 1952, whilst driving Austin motor car, Index No. KGH 521, on the road leading from Brook Street, Brentwood, to Ingrave at Mascalls Lane, Great Warley, at the junction with Warley Hill, you did drive the said motor car in a manner which was dangerous to the public, having regard to all the circumstances of the case."

As I said in *Venn v. Morgan* (1), in considering whether a notice purporting to be given under s. 21 is sufficient, we ought to use a modicum of common sense. OLIVER, J., in giving judgment in that case, pointed out that these notices are not formal documents like informations or indictments. He said:

"The object of the notice is to call the attention of the driver of the motor car to the time and circumstances in respect of which he may be charged so as to give him... an opportunity, in good time while memories are still fresh, to prepare his defence."

In my opinion, the principle we have to bear in mind here is that there is a distinction between the construction to be placed on provisions of a statute which are mandatory and provisions which are merely directory. In that connection I may quote a passage from MAXWELL ON INTERPRETATION OF STATUTES, 10th ed., p. 376:

"It has been said that no rule can be laid down for determining whether the command [of the statute] is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may, perhaps, be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice (*Reg. v. Ingall* (2) 2 Q.B.D. 208, per LUSH, J.), and, when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded. The general rule is, that an absolute enactment must be obeyed

(1) 113 J.P. 504; [1949] 2 All E.R. 562, 563, 564.

(2) (1876), 41 J.P. 181; 2 Q.B.D. 199, 208.

or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

In *Woodward v. Sarsons* (1) LORD COLERIDGE, C.J., giving the judgment of the court, said:

"... the general rule is, that an absolute enactment must be obeyed or fulfilled exactly, but it is sufficient if a directory enactment be obeyed or fulfilled substantially."

That was a case dealing with the marking by a presiding officer of ballot papers for illiterate voters under r. 26 of the Rules for Parliamentary Elections in sched. I to the Ballot Act, 1872, which, it was said, was absolute. The rules were held to be directory, and disregard of their provisions was held not to invalidate the votes provided that the object of the Act was obtained, that is to say, the effect of the voting was kept secret. Here, the object of the Act, as OLIVER, J., said in the passage I have read, is to bring to the defendant's mind, when the events are still fresh in his memory, the fact that he is going to be prosecuted. The respondent could have been under no conceivable doubt what he was to be prosecuted for. He was told the exact place where he was alleged to have committed the offence, and that was the place where the accident happened. Therefore, it is idle to say that his mind was not at once directed to the actual occurrence in respect of which he was going to be prosecuted. In my opinion, we should apply the passage I have quoted from *Woodward v. Sarsons* (1) and say that the mandatory part of s. 21 (c) is the serving of a notice of intended prosecution on the defendant specifying the nature of the offence in respect of which he is going to be prosecuted. Here that offence was dangerous driving at the place mentioned, and the mere fact that the actual hour was incorrectly stated in the circumstances makes no difference. If a person met with two accidents on the same day at or about the same place, possibly other considerations might apply, because he might then say he was misled. Here the respondent, on whom was the onus of showing he was misled, gave no evidence.

In my opinion, the justices came to a wrong decision. The case must go back to them with an expression of opinion that the notice was good, and they must proceed to hear the case.

PARKER, J.: I agree.

DONOVAN, J.: I also agree.

*Case remitted.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *Arthur Morgan*, Chelmsford (for the appellant); *Patersons, Snow & Co.*, agents for *Gepp & Sons*, Chelmsford (for the respondent).

T.R.F.B.

(1) (1875), L.R. 10 C.P. 733, 746.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 16, 1953

EVANS v. JONES

*Food and Drugs—Milk—Adulteration—Milk still of good quality—Gravity of offence—Food and Drugs Act, 1938 (1 and 2 Geo. 6, c. 56), s. 3 (1).*

The respondent was charged with selling to the prejudice of the purchaser milk which was not of the quality demanded, contrary to s. 3 (1) of the Food and Drugs Act, 1938. Samples of the milk taken were found on analysis to contain added water and to show a deficiency in milk-solids other than milk-fats below the percentage prescribed by reg. 2 of the Sale of Milk Regulations, 1939. There was no evidence to show who had added the water. The justices found that, even though water was added, the milk was still good milk, and, being of opinion that the offence was trivial, dismissed the informations.

HELD: that the justices had confused matters of defence with matters of mitigation; that, even if the offence were trivial, they were entitled under the Criminal Justice Act, 1948, not to dismiss the information, but only to grant an absolute or conditional discharge; and that at the present time the adulteration of milk could not be regarded as a trivial offence merely because the purchaser obtained the fat content to which he was entitled. The case must be remitted to the justices with a direction to convict.

*Banks v. Wooller* (1900) (64 J.P. 245) not followed.

CASE STATED by Montgomeryshire justices.

At a court of summary jurisdiction sitting at Machynlleth on Feb. 4, 1953, the appellant, Evan Walter Evans, an inspector of food and drugs for the county of Montgomery, preferred two informations against Alfred Lewis Jones, a dairy farmer, charging that on Dec. 10 and Dec. 12, 1952, he unlawfully sold to the prejudice of the purchaser, the Milk Marketing Board, milk which was not of the quality demanded by the purchaser, contrary to the Food and Drugs Act, 1938, s. 3 (1).

It was proved or admitted that on Dec. 10, 1952, the respondent supplied milk from his farm in pursuance, or purported pursuance, of a written contract between himself and the Milk Marketing Board and of a written direction made thereunder, to a milk retailer, Meirion Lewis, which was from the previous evening's milking and had been kept overnight at the farm. On the same day the appellant purchased a pint of the milk from the retailer for the purpose of analysing it. The retailer knew that a sample of the milk would be taken for analysis and he did not tamper with it or add any water or other milk to it. The public analyst found in his certificate of analysis under s. 69 (3) of the Act that, calculated on the standard of 8.5 per cent. for solids not fat, the milk contained added water to the extent of nine per cent. of the bulk, and that it contained 7.7 per cent. solids not fat and 4.6 per cent. fat-solids. On Dec. 12, 1952, the appellant, together with the retailer, visited the respondent's farm and found there two churns of milk awaiting collection by the retailer. One of the churns contained milk from the previous evening's milking and the other contained milk from that morning's milking. The appellant took samples of approximately one pint from each churn for analysis. The public analyst found that the previous evening's milk, calculated on the standard of 8.5 per cent. for solids not fat, contained added water to the extent of four per cent. of the bulk, and that it contained 8.2 per cent. solids not fat and 4.4 per cent. fat-solids. The sample from the morning's milk was found to be pure and unadulterated, containing the prescribed quantities of non-fat and fat-solids. The respondent did not require the public analyst to be called as a witness nor did

he call as witnesses his sister-in-law and a manservant who both handled milk which was left at the farm overnight. Apart from the fact that water was present in both the samples of the evening milk, it was good milk, notwithstanding that in each case the percentage of milk-solids other than milk-fat was below the percentage of 8.5 per cent. prescribed in the Sale of Milk Regulations, 1939 (S.R. & O., 1939, No. 1417), reg. 2. There was no evidence to show who had added the water to the milk. The appellant had known the respondent since 1937, had carried out previous tests on his milk from time to time, and had found no cause for complaint.

It was contended on behalf of the appellant that the milk in both cases, notwithstanding its good quality in that the percentage of fat-solids exceeded the prescribed percentages, was sold to the prejudice of the purchaser within the meaning of s. 3 (1) of the Act as it was not of the quality demanded by virtue of the addition of the water, and that the respondent had failed to rebut the presumption laid down in reg. 2 of the regulations of 1939 that the milk was not genuine since it contained less than 8.5 per cent. of milk-solids other than milk-fat. It was contended on behalf of the respondent that both samples of milk were of very good quality and that the purchaser was not prejudiced, notwithstanding the unexplained presence of a small quantity of water therein.

The justices were of the opinion that the respondent, by his failure to call evidence, had failed to prove that the milk complained of was in the same state as it came from the cow, but were of opinion that both informations should be dismissed since it had been proved to their satisfaction that the milk in question was of very good quality and that the presence of water in the quantities tested did not make it prejudicial to the purchaser. The appellant appealed.

*Ahern* for the appellant.

The respondent did not appear.

**PARKER, J.:** This is a Case stated by justices for the county of Montgomery before whom the respondent was charged with two offences under s. 3 (1) of the Food and Drugs Act, 1938, in that he sold milk that was adulterated or was not genuine milk. [His LORDSHIP stated the facts and continued:] The magistrates held that, although no attempt had been made, by calling the sister-in-law or the manservant, to prove that the milk was in the same state as when it came from the cow, nevertheless it was, by reason, presumably, of the content of fat-solids, very good quality milk, and that the presence of water in the quantities proved did not make its sale prejudicial to the purchaser. There is ample authority for holding that where the purchaser does not get what he demands, which here was genuine milk, the sale is to his prejudice, but the magistrates, apparently, held that, as the milk was still good, the offence was trivial, and so they were entitled to dismiss it. They did that in reliance on the decision of *Banks v. Wooler* (1), decided under the Food and Drugs Act, 1875, s. 6, where CHANNELL, J., said:

"If the milk had been exceptionally good after adulteration, the justices might have considered the offence too trifling to convict. If the milk had only been exceptionally good before adulteration, the offence was not trifling, and they should have convicted."

That case, however, was decided before the Sale of Milk Regulations, 1939, and the Criminal Justice Act, 1948. The summons was dismissed under s. 16 of the Summary Jurisdiction Act, 1879, which empowered justices to dismiss a summons in the case of a trifling offence. Whatever was thought in 1900 as to the gravity

(1) (1900), 6: J.P. 245.



or triviality of selling milk with an adulteration of ten per cent., it seems to me that, today, any adulteration of milk is far from being a trivial offence. Indeed, if one takes CHANNELL, J.'s words literally, they mean that the richer the milk the more you are entitled to adulterate it and treat the matter as a triviality.

In my opinion, an offence was clearly proved here. By reason of the Criminal Justice Act, 1948, s. 7 (1), the magistrates might, if they considered the offence trivial, have granted either a conditional or an absolute discharge after finding the offence proved, but they have confused matters of defence with matters of mitigation and have failed to convict when an offence was clearly proved. Whether the matter is to be considered trivial or not is for the magistrates to decide, but because in 1900 an adulteration of ten per cent. of water was treated as trivial it does not follow that it is the same today. In my opinion, this case should go back with a direction to the magistrates to convict.

DONOVAN, J.: I agree. It should be remembered that a great deal of public money is spent on milk today under the provisions of the various welfare schemes. That would appear to me to underline the importance of not regarding adulteration by water as trivial.

LORD GODDARD, C.J.: I agree. I only want once more to emphasise how careful magistrates should be not to confuse matters of defence with matters of mitigation. In *Banks v. Wooler* (1) the passage on which the magistrates relied only showed that in the days when s. 16 of the Summary Jurisdiction Act, 1879, was in force magistrates, if they thought a case trivial, were required to dismiss it. They are no longer required to dismiss a case which they consider trivial. They must convict, but they can grant an absolute discharge or a conditional discharge under the Criminal Justice Act, 1948, s. 7 (1). In spite of the fact that one of the judges who decided *Banks v. Wooler* (1) was CHANNELL, J., for whose judgments I always have the highest respect, I certainly cannot agree that, if I buy milk and am served with milk and water, that is a trivial offence. PARKER, J., has pointed out that it would mean the better the milk the greater the adulteration permitted. No adulteration is permitted today, and here there is clear evidence that there was adulteration. In my opinion, the magistrates cannot treat this as a trivial case. On the question of penalty, I think the magistrates must pay attention to what this court has said in giving judgment today, that these offences of watering milk are not to be regarded as trivial merely because the result of the adulterated milk will give the purchaser the butter-fat he is entitled to get.

*Case remitted.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *P. E. White*, clerk of the county council, Welshpool (for the appellant).

T.R.F.B.

(1) (1900), 64 J.P. 245.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 15, 1953

BROWN v. DREW

*Licensing—Occasional licence—Premises already licensed under full licence—**Validity of occasional licence—Licensing (Consolidation) Act, 1910 (10 Edw.**7 and 1 Geo. 5, c. 24), s. 64 (1), (3).*

Section 64 of the Licensing (Consolidation) Act, 1910, which is concerned with the grant of occasional licences, by subs. (3) provides: "... the place in which any intoxicating liquor is sold in pursuance of the occasional licence shall be deemed to be licensed premises. . . ."

The statutory fiction created by the subsection applies only where the premises in respect of which an occasional licence has been granted are unlicensed, and nothing in the section prohibits the grant of an occasional licence in respect of premises already licensed.

CASE STATED by Cornwall justices.

On Feb. 11, 1953, at a court of summary jurisdiction sitting at Liskeard, an application under the Licensing (Consolidation) Act, 1910, s. 64, was made by the respondent, Kenneth Bailey Drew, of the Looe Hotel, for an occasional licence between the hours of 8 p.m. and 11 p.m. on Feb. 14, 1953, in respect of the Hannaford Point Hotel, Looe, on the occasion of a Valentine Night ball. The application was opposed by the appellant, George Brown, a chief inspector of police. It was proved or admitted that the respondent was the holder of a justices' licence authorising him to sell by retail at the Looe Hotel any intoxicating liquor for consumption either on or off the premises; that one R. C. Roberts was the holder of a justices' licence authorising him to sell by retail at the licensed premises known as the Hannaford Point Hotel any intoxicating liquor for consumption on the premises on condition that no intoxicating liquor be sold by retail for consumption on the premises unless such liquor was either (a) sold to any person or persons residing in the said hotel or (b) sold or served to any person or persons not residing in the said hotel at the same time as a meal and for consumption at such meal; and that the said Roberts was organising the ball in respect of which the application for the occasional licence was made.

For the appellant it was contended that the justices were not empowered to grant an occasional licence to take effect on premises which were already licensed; that under the Licensing (Consolidation) Act, 1910, s. 64 (3), premises in respect of which an occasional licence was granted were deemed to be licensed premises, and such premises could not be actual licensed premises; and that, if the application were granted, there would be two licences in force for the same premises with possibly different conditions, and it would be impossible for the police properly to supervise the premises. For the respondent it was contended that the word "deemed" appeared twice in s. 64 (3) and must bear the same meaning in each context, and that in the case of the words "a person taking out an occasional licence shall be deemed to be the holder of a justices' licence" the word "deemed" could not bear the meaning assigned to it by the appellant, as the only person authorised to apply for an occasional licence was one who was already the holder of a licence, i.e., a retailer's excise on-licence for the sale of spirits, beer or wine; and that whether the police could or could not properly supervise premises was a question for the justices to consider when exercising their discretion as to the granting of an occasional licence, but it did not affect their jurisdiction. The justices being of the opinion that

they had power to grant the occasional licence, and that it was advisable so to do, in the exercise of their discretion granted to the respondent the occasional licence applied for. The appellant appealed.

*King Annington* for the appellant.

The respondent did not appear.

**LORD GODDARD, C.J.:** This Case stated by justices for the county of Cornwall raises a curious point under the Licensing (Consolidation) Act, 1910, s. 64, which does not seem to have arisen before. [His LORDSHIP stated the facts and continued:] Section 64 provides:

"(1) An occasional licence shall not be granted except with the consent of a petty sessional court, and unless twenty-four hours at least before applying for that consent the applicant has served on the superintendent of police for the district notice of his intention to apply for the consent, setting out his name and address, the place and occasion in respect of which the licence is required, the period for which the licence is to be in force, and the hours to be specified in the consent of the justices . . .

(3) For the purpose of the provisions of this Act . . . and for the purpose of s. 12 of the Licensing Act, 1872, and any provisions for giving effect to those sections, a person taking out an occasional licence shall be deemed to be the holder of a justices' licence, and the place in which any intoxicating liquor is sold in pursuance of the occasional licence shall be deemed to be licensed premises, and to be the premises of the person taking out the occasional licence."

As counsel for the appellant has pointed out, although this part of the subsection provides that a person taking out an occasional licence shall be deemed to be the holder of a licence, only a person who already holds a licence can obtain an occasional licence. Counsel argues that the words in the section, "the place in which any intoxicating liquor is sold in pursuance of the occasional licence shall be deemed to be licensed premises", prohibit the grant of a licence in respect of premises which are already licensed. I cannot accept that argument. It is obvious that this statutory fiction as to licensed premises is intended to, and must, apply to premises which are not licensed. If they are not licensed, they are deemed to be licensed directly an occasional licence is granted in respect of them. The common case is the refreshment marquee at an agricultural or flower show. Those places are subject to an occasional licence and are, therefore, deemed to be licensed premises, but I do not think that that means that an occasional licence cannot be granted in respect of premises which are already licensed. I cannot find anything in s. 64 which so provides. It would have been open to the justices to have said, if they had seen fit, that this occasional licence was to apply only to the ballroom or some other part of the hotel. I can see that there are objections to such a course, but we have only to decide whether or not the justices have power to do that which they did. The question whether or not we should have approved of it if we had been the justices does not arise. For these reasons the appeal must be dismissed.

**PARKER, J.:** I agree.

**DONOVAN, J.:** Where any premises are unlicensed, the statutory fiction introduced by s. 64 (3) operates, but it is not necessary to invoke the fiction where premises are already licensed.

*Appeal dismissed.*

Solicitors: *Jaques & Co.*, agents for *Stephens & Scown*, St. Austell (for the appellant).

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 17, 1953

FISHER v. SANTOVIN, LTD.

FISHER v. YARDLEY'S LONDON AND PROVINCIAL STORES, LTD.

*Food and Drugs—Information against retailer—Proceedings against third party as person to whose act or default offence due—Information against retailer not withdrawn—Competency of proceedings against third party—Food and Drugs Act, 1938 (1 and 2 Geo. 6, c. 56), s. 83 (3).*

On Dec. 11, 1952, the appellant, on behalf of a local authority, laid an information against Y., Ltd., charging them with selling to the prejudice of the purchaser a bottle of wine which was not of the substance demanded by the purchaser, contrary to s. 3 (1) of the Food and Drugs Act, 1938. On Jan. 6, 1953, the authority, being satisfied that Y., Ltd., could establish a defence under s. 83 (1) of the Act and that the offence was due to the act or default of S., Ltd., who had sold the bottle to Y., Ltd., preferred an information under s. 83 (3) of the Act against S., Ltd. The authority did not ask for the information originally preferred against Y., Ltd., to be withdrawn, and so it was still on the file when the information against S., Ltd., was heard. The magistrates dismissed both informations.

HELD: that the right of the authority to proceed against the seller under s. 3 (1) and against the person responsible for the offence under s. 83 (3) were alternative; that the proceedings against S., Ltd., could not be taken while the information against Y., Ltd., remained on the file; and, that, therefore, the magistrates were right in dismissing both informations.

CASES STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Clerkenwell the appellant, Stanley George Fisher, a sanitary inspector, on behalf of the mayor, aldermen and councillors of the metropolitan borough of Holborn, laid an information against Yardley's London and Provincial Stores, Ltd., the first respondents, on Dec. 11, 1952, and against Santovin, Ltd., the second respondents, on Jan. 6, 1953. In the case of the first respondents the information charged that they at their branch at 56 Lamb's Conduit Street, Holborn, did sell to the prejudice of the purchaser a food which was not of the substance demanded by the purchaser in that they did sell to Lieut. D. M. Grant, R.A.M.C., instead of a bottle of sherry demanded by him a bottle containing 99.96 per cent. of water, contrary to the Food and Drugs Act, 1938, s. 3. In the case of the second respondents the information, which was in respect of the same sale of sherry (supplied by the second respondents to the first respondents), was laid under s. 83 (3) of the Act and stated that the food and drugs authority for the borough of Holborn were satisfied that the offence was due to the act or default of the second respondents and that the first respondents could establish a defence under the Food and Drugs Act, 1938, s. 83 (1).

On the hearing of the informations on Feb. 20, 1953, it was proved or admitted that on Dec. 22, 1952, the first respondents sent to the appellant a copy of a warranty given by the second respondents in respect of the bottle of sherry together with a notice which complied with s. 84 of the Act of 1938. On Jan. 6, 1953, the appellant laid an information against the second respondents who, on Jan. 15, 1953, informed the appellant that they also intended to rely on a warranty under s. 84 of the Act, given by their suppliers Geo. Jones and Co. (London), Ltd. On Jan. 24, 1953, the appellant laid an information against Geo. Jones & Co. (London), Ltd. in respect of the sale of the bottle of sherry stating that he was satisfied that the sale was due to the default of Geo. Jones & Co. and that the first and second respondents could both establish defences



under s. 83 (1) of the Act. On the hearing of the informations against both respondents and Geo. Jones & Co., it was contended on behalf of both respondents that in making use of s. 83 (3) against prior parties in the chain the appellant withdrew or abandoned the summonses against the respondents, and that in so doing the appellant had acknowledged that in law the respondents were not guilty of an offence and that the summons should be dismissed. In addition it was contended on behalf of the second respondents that s. 83 (1) entitled the defendant and not the prosecution to have any person to whose act or default he alleged that the contravention in question was due, brought before the court in the proceedings and that the scheme of s. 83 contemplated that the prosecution should elect against which one of the parties he would cause proceedings to be taken. On the part of the appellant it was contended that a chain of distributors and vendors having been established, they could all be brought before the court as defendants and at the same time; that it was not for the appellant to usurp the privileges of the court by discontinuing proceedings which had been properly brought; and that the appellant was reasonably satisfied that the respondents had a defence because of their pleas of a warranty, but could not be completely satisfied until this defence had been proved to the satisfaction of the court and all the conditions imposed by s. 84 had been complied with.

The learned magistrate dismissed the informations.

*Paul Wrightson* for the appellant.

*J. C. G. Burge* for the first respondents.

*J. N. Hutchinson* for the second respondents.

**LORD GODDARD, C.J.:** These are Cases stated by a metropolitan magistrate sitting at Clerkenwell Police Court, who dismissed two summonses issued under the Food and Drugs Act, 1938. The point that has arisen is under s. 83 of that Act.

Yardley's London and Provincial Stores, Ltd. (to whom I refer hereafter as "Yardleys") sold a bottle of so-called wine. The bottle contained nothing but coloured water. Yardley's had purchased it from a firm known as Santovin, Ltd., and we were told that Santovin, Ltd., obtained it from one, Jones, but he is not before the court. The food and drugs inspector of the Holborn Borough Council quite properly thought that proceedings should be taken, and he took proceedings against Yardley's.

The Food and Drugs Act, 1938, s. 83, was designed largely to save costs and also to give a complete defence in some cases where there was not a warranty. By s. 83 (1), if a shopkeeper has sold to a purchaser goods which turn out to be adulterated and is summoned for a breach of the Act, he has the right of bringing in as a defendant the person by whom he was supplied with those goods, i.e., his wholesaler, and, moreover, the wholesaler can also make use of the section, so it has been held, and bring in the person who supplied him, e.g., the shipper, but for the purposes of this case we confine ourselves to the retailer and wholesaler. Section 83 provides by sub-s. (1):

"A person against whom proceedings are brought under this Act shall, upon information duly laid by him and on giving to the prosecution not less than three clear days' notice of his intention, be entitled to have any person to whose act or default he alleges that the contravention of the provisions in question was due brought before the court in the proceedings, and, if, after the contravention has been proved, the original defendant proves that the contravention was due to the act or default of that other person, that other person may be convicted of the offence, and, if the original

defendant further proves that he has used all due diligence to secure that the provisions in question were complied with, he shall be acquitted of the offence."

That is a very valuable sub-section. It allows the shopkeeper to bring in the wholesaler, but it also provides that, unless the shopkeeper shows that he has taken reasonable steps, he also can be convicted. Then it is provided by sub-s.

(2) that where a defendant is brought in under sub-s. (1):

"(a) the prosecution, as well as the person whom the defendant charges with the offence, shall have the right to cross-examine him, if he gives evidence, and any witness called by him in support of his pleas, and to call rebutting evidence; (b) the court may make such order as it thinks fit for the payment of costs by any party to the proceedings to any other party thereto."

It may be that one or both of the defendants are responsible, but it frequently happens that the food and drugs inspector knows quite well that the shopkeeper who is selling some proprietary article has no reason to suppose that the proprietary article is other than it is represented to be, yet when it is bought and analysed it is found that it is adulterated. The fault there clearly lies with the supplier. If the retailer has sold packet goods in the same condition as he had bought them, justice requires that the person who is really responsible, i.e., the supplier—it may be the manufacturer or the wholesaler—should be brought before the court and dealt with and not the shopkeeper, and so the Act provides by sub-s. (3):

"Where it appears to the authority concerned that an offence has been committed in respect of which proceedings might be taken under this Act against some person [the shopkeeper] and the authority are reasonably satisfied that the offence of which complaint is made was due to an act or default of some other person [the manufacturer] and that the first-mentioned person could establish a defence under sub-s. (1) of this section, they may cause proceedings to be taken against that other person without first causing proceedings to be taken against the first-mentioned person. In any such proceedings the defendant may be charged with and, on proof that the contravention was due to his act or default, be convicted of, the offence with which the first-mentioned person might have been charged."

The wording of that sub-section and the use of the word "may" seem to indicate that proceedings will not be taken against the first person if proceedings are to be taken against the "other person" under s. 83 (3).

A summons was issued against Yardley's. Yardley's might have used s. 83 (1), which they would have to do not less than three days before the hearing, or they might have availed themselves of the provisions of s. 84, which deal with relying on a warranty. Before this case came on, however, a further summons was issued against Santovin, Ltd., and it was therein recited that Yardley's had been charged with selling to the prejudice of the purchaser and that the council of the metropolitan borough of Holborn were reasonably satisfied that the offence was due to the act or default of Santovin, Ltd., and that Yardley's could establish a defence under s. 83 (1). Leave of the magistrate to withdraw the information against Yardley's was not sought. It is absurd that Yardley's are being prosecuted while Santovin, Ltd., are being prosecuted on the ground that the prosecutors are satisfied that the offence was that of Santovin, Ltd., and that Yardley's have a good defence.

It seems to the court that s. 83 (3) is only applicable where no proceedings are taken against the retailer. These two proceedings cannot be carried on

concurrently because it is an abuse to ask a court to hear a case and convict a man whom the prosecutor, being a public authority, is satisfied or reasonably satisfied has committed no offence and has a perfectly good defence. I am not saying by any means, speaking for myself, that if the proceedings had been taken against Yardley's and then the local authority had come to the conclusion, rightly or wrongly, that Santovin, Ltd., were really liable, they might not have asked for the leave of the court to withdraw the proceedings and then have taken proceedings under sub-s. (3), but I think that it is quite clear that proceedings under sub-s. (3) cannot go on contemporaneously with proceedings against the retailer. The retailer might in this case three days before the summons was heard have served notice that he was going to bring in Santovin, Ltd., but one cannot expect him to do that when Santovin, Ltd., have been brought in by the local authority. At any rate, we think these proceedings were misconceived, and, therefore, the magistrate was quite right in dismissing these two proceedings which have been left on the file because, as counsel for Santovin, Ltd., has properly pointed out, if the proceedings had been taken by Yardley's under s. 83 (1), s. 83 (2) gives him certain rights which he has not got under s. 83 (3). For these reasons, I think the magistrate came to a right conclusion in point of law and the appeals should be dismissed.

PARKER, J.: I agree.

DONOVAN, J.: I agree.

*Appeal dismissed.*

Solicitors: *C. F. S. Chapple* (for the appellant); *J. E. Lickfold & Sons* (for the first respondents); *W. T. Ricketts & Son* (for the second respondents).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 16, 17, 1953

REG. v. METROPOLITAN POLICE COMMISSIONER. *Ex parte* PARKER

*Police—Revocation of cab licence—Inquiry—Refusal to allow taxicab driver to call witness.*

The applicant was a licensed taxicab driver, and it was brought to the attention of the Commissioner of Police of the Metropolis that he was alleged by the police to have been allowing his cab to be used by prostitutes for the carrying on of their trade. The commissioner assented in writing to a proposal by an assistant commissioner that the applicant should be brought before the licensing committee, that he should be confronted with the police constables concerned, and that his licence should be revoked unless anything transpired before the committee which might lead him (the commissioner) to alter his decision to revoke the licence. At the enquiry held by the committee the applicant desired to call a witness, but the committee declined to allow him to do so, and the licence was revoked. The applicant obtained leave to apply for an order of certiorari to quash the order of revocation made by the commissioner on the ground that, by reason of the committee's refusal to hear the witness whom the applicant desired to call, the rules of natural justice had been violated.

HELD: that there were no grounds for saying that the revocation of the applicant's licence was a judicial act or that the licence had been revoked by a judicial or quasi-judicial person, nor was the committee a judicial or quasi-judicial body, and, therefore, the application must be refused.

MOTION for order of certiorari.

On Oct. 20, 1952, the Commissioner of Metropolitan Police became satisfied that, by reason of circumstances coming to his notice, the applicant, Albert Arthur Parker, a licensed cab driver, was not a fit person to hold such a licence. The commissioner, however, assented in writing to a proposal by Assistant-Commissioner Henry Dalton that the applicant should be brought before the licensing committee and be confronted with Police-constables Key and Scarborough who had made complaints about the applicant. The commissioner also orally informed Assistant-Commissioner Dalton that the applicant's licence should be revoked unless anything transpired before the committee which, in their opinion, might lead him to re-consider his decision to revoke the licence. At the sitting of the committee on Oct. 23, 1952, Police-constables Key and Scarborough read statements to the effect that on Oct. 4, 1952, between 11 p.m. and midnight, they had kept observation on the applicant's taxicab and had seen the applicant take into his cab prostitutes and men and that at midnight the flag of the cab was in the "For hire" position and no money was charged on the meter. The applicant denied this, and said that at about 11 p.m. he had taken a Mr. Gray from the Regent Palace Hotel to the Benelux Restaurant and between 11 p.m. and midnight was waiting, on Mr. Gray's instructions, for him to come out of the restaurant. He also denied that his flag was in the "For hire" position, and said that when he had taken Mr. Gray back to the Regent Palace Hotel 8s. 3d. showed on the meter. The applicant asked to be permitted to call Mr. Gray as a witness to support his contentions, but he was not allowed to do so. In the opinion of the committee, nothing had transpired which might lead the commissioner to re-consider his decision to revoke the applicant's licence, and, accordingly, the assistant commissioner informed the applicant that his cab licence was revoked.

On a motion for an order of certiorari to bring up and quash the order for revocation of the licence, it was contended on behalf of the applicant that the inquiry before the committee was in the nature of a judicial proceeding, and in view of the refusal of the committee to allow the defendant to call Mr. Gray as a witness there had been a denial of natural justice.

*Paul Wrightson* for the applicant.

*Buzzard* for the Commissioner of Metropolitan Police.

**LORD GODDARD, C.J.:** Counsel for the applicant moves for an order of certiorari to bring into this court for the purpose of being quashed an order made against Albert Arthur Parker dated Oct. 23, 1952, by the Commissioner of Police for the metropolis revoking his hackney carriage driver's licence, pursuant to the London Cab Order, 1934, para. 30 (1). Briefly stated the grounds are that an inquiry was held by the Commissioner of Police and at that inquiry the applicant desired to call a witness, but the persons holding the inquiry declined to hear the witness. Therefore, it is said, the rules of natural justice were violated.

The applicant was licensed some years ago, and his career as a taxicab driver has not been without blemish. He has been warned and convicted of offences against various Acts of Parliament in relation to the use of his cab. According to a letter which is exhibited in these proceedings, that was with regard not only to traffic offences, but also to other breaches of the law. The letter says:

"He was repeatedly warned of the possible consequences if he continued to offend. Despite these warnings he continued to incur convictions and as a result his cab-driver's licence was suspended for one month in 1947, and again for three months in 1950."



At the material times in this case it was brought to the attention of the commissioner that the applicant was alleged by the police to have been allowing his cab to be used by prostitutes for the carrying on of their trade and to have been permitting men to enter the cab for the purpose of sexual intercourse. The result was that the commissioner resolved to withdraw his licence.

It is necessary to remember that we are here asked to grant certiorari, and when the application was made for leave to move for certiorari both PARKER, J., and I expressed considerable doubt whether or not certiorari would lie. The argument which has taken place today has confirmed me in the opinion I then expressed that certiorari will not lie. Certiorari is a remedy of a very special nature. For the purpose of quashing an order it lay originally only to a court. In *SHORT AND MELLOR, THE PRACTICE OF THE CROWN OFFICE*, and other works, the function of the writ of certiorari is discussed. The writ called on an inferior court to return to this court the order which the inferior court had made and which it was sought to challenge, or the record of the court if it was a court of record. It was then for this court to examine the record or order and see whether or not the order was made in accordance with law. One of the most common cases in which it was moved was to ascertain whether there had been an excess of jurisdiction. There have been many cases recently of certiorari, but in all of them it was sought to challenge an order of a tribunal of some description. Formerly, no doubt, the writ did not lie to anybody except what could be called a court, but in recent years, with the development of what may be called administrative law under which government departments are given wide powers of holding inquiries and making orders affecting the property of various persons, the remedy of certiorari has been considerably extended. The principles on which it will be granted are to be found most clearly stated in the well-known judgment of ATKIN, L.J., in *Rex v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1).

One matter which counsel for the applicant specially emphasised when he applied for leave to move was that mandamus would lie to the Commissioner of Police in respect of hackney carriage licences, and he sought to argue that, as mandamus would lie, certiorari would lie. There is an essential fallacy in his argument on that point. Mandamus will lie to any person who is under a duty imposed by statute or by the common law to do a particular act. If that person refrains from doing the act or refrains from wrong motives from exercising a power which it is his duty to exercise, this court will by order of mandamus direct him to do what he should do. Mandamus may go to individuals. It may go to corporations, and it goes quite independently of whether the individual or body to which it is addressed is or is not a court.

The position of the Commissioner of Police in respect of hackney carriage licences ought, I think, to be stated. We need not go back further than the Metropolitan Public Carriage Act, 1869. By s. 6 of that Act, the duty of licensing cabs and drivers was placed on the Secretary of State, and by s. 11 the Secretary of State was empowered to delegate his powers—and he has delegated them—to the Commissioner of Police. So far as the granting of licences is concerned, it was provided in an order made by the Secretary of State, dated Dec. 30, 1907, that

“ . . . (A) a licence shall not be granted to any person under the age of twenty-one years, and any licence so granted shall be void.”

In that case, there is no discretion at all; if an applicant is under twenty-one years of age, he cannot have a licence. Then:

(1) 88 J.P. 13; [1924] 1 K.B. 171.

"(b) The commissioner may at his discretion refuse a licence to any person who has been convicted of a felony, misdemeanour, or of cruelty to animals, or who, having previously held a licence for a cab or a stage carriage, has had such previous licence revoked or suspended."

It was decided by the Court of Appeal in *Rex v. Metropolitan Police Comr. Ex p. Holloway* (1), that that provision limited the discretion of the commissioner in that he could only refuse an application on the grounds which are set out in the regulation—in other words, he had not an unfettered discretion. If any person of twenty-one years of age applies to the commissioner for a licence, unless one of the exceptional circumstances which are dealt with in the order apply to him, he is entitled to have one granted to him subject to the right of the commissioner to revoke the licence.

The present position with regard to the revocation of a licence is to be found in para. 30 of the London Cab Order, 1934, which was made under the Metropolitan Public Carriage Act, 1869, and that paragraph shows clearly, as one would expect, that a licence may be revoked or suspended. Indeed, leaving out of account irrevocable licences granted under seal and possibly licences coupled with an interest, the very fact that a licence is granted to a person would seem to imply that the person granting the licence can also revoke it. A licence is nothing but a permission, and, if a man is given permission to do something, it is natural that the person who gives the permission will be able to withdraw the permission. As a rule, where a licence is granted, the licensor does not have to state why he withdraws his permission. Unless he has given a licence for a definite period, thereby giving some contractual right, he can withdraw it. Paragraph 30 (1) of the order is in these terms:

"A cab-driver's licence shall be liable to revocation or suspension by the Commissioner of Police if he is satisfied, by reason of any circumstances arising or coming to his knowledge after the licence was granted, that the licensee is not a fit person to hold such a licence."

In the present case, facts having come to the commissioner's knowledge with regard to the alleged repeated use of the applicant's cab by disorderly women, the commissioner decided to withdraw the licence. Counsel for the applicant, in my opinion, very properly conceded that, if the commissioner had simply said: "I withdraw your licence", he could not argue that the commissioner was bound to hold an inquiry or hear evidence or anything else. The wording of the paragraph seems to me to make it clear that it is not intended that there should be held anything in the nature of a judicial inquiry or that the commissioner should be put in the position of a judge or quasi-judge. The commissioner can withdraw the licence or suspend it by reason of any circumstance which comes to his knowledge. In other words, he can act on hearsay if he likes, and I suppose in many cases he acts on a complaint, though in most cases, I expect, he would satisfy himself as far as he can that the information that comes to his knowledge is accurate. In this case the commissioner in his affidavit, which the court sees no reason to doubt, says:

"On Oct. 20, 1952, I became satisfied by reason of circumstances arising after the said licence was granted that the said Albert Arthur Parker was not a fit person to hold such a licence. I thereupon assented in writing to a proposal by Henry Dalton, Assistant-Commissioner 'B' Department, Metropolitan Police, that the said Albert Arthur Parker should be brought before the licensing committee and that he should be confronted with

(1) 75 J.P. 490; [1911] 2 K.B. 1131.

Police-constables Robert Key and Carl Scarborough. The said committee is a departmental committee set up by me to assist me in such matters. I further instructed the said assistant-commissioner orally that the said Albert Arthur Parker's said licence should be revoked unless anything transpired before the said committee which in their opinion might lead me to re-consider my decision to revoke the said licence."

It is argued that the commissioner, if he chose, having been satisfied that the applicant was not a fit person to hold a licence, could have said: "I withdraw your licence", and that would have been perfectly valid and his decision could not be challenged, but that, having made up his mind to that effect, he took the view that there might be some room for mistake, and he, therefore, decided on the course which was adopted. As I have said, it is impossible to find on the wording of para. 30 (1) under which the commissioner acted that he was in the position of either a judge or a quasi-judge. Exactly what a quasi-judge is nobody has ever attempted to define, but I suppose he is a person who has to hear evidence and come to a conclusion on facts. One would expect, where an order of certiorari is sought, that a judge or quasi-judge would have made an order or something in the nature of an order, because otherwise what is to be brought up to be quashed in this court? The motion is to bring up an order of the commissioner. There is nothing here to show that there ever was an order. It was simply a decision of the commissioner that, by reason of facts coming to his knowledge, he was satisfied that the licensee was not a fit person to hold the licence. In all the cases which have been cited to us (and I do not propose to go through them because all the cases on the subject were considered by the court in *Reg. v. Manchester Legal Aid Committee. Ex p. R. A. Brand & Co., Ltd.* (1)) a department of State has either passed a resolution or made an order consequent on a resolution which can be quashed or to which some objection can be taken. Here, there is nothing, and, in my opinion, it is impossible to say that the commissioner—in fact, it is not said—if he acted alone was in a judicial or quasi-judicial position. He was exercising what I may call a disciplinary authority, and where a person, whether he is a military officer, a police officer, or any other person whose duty it is to act in matters of discipline, is exercising disciplinary powers, it is most undesirable, in my opinion, that he should be fettered by threats of orders of certiorari and so forth, because that interferes with the free and proper exercise of the disciplinary powers which he has. In this case the applicant was given a chance, by cross-examination of or confrontation with the police officers, of extracting some fact which, if it was brought to the notice of the commissioner, might have influenced him before his decision was actually promulgated through the mouth of the assistant-commissioner.

For these reasons, in my opinion, there is no ground for saying that the withdrawal of the licence granted by the Commissioner of Police to the applicant was a judicial act, nor that it was done by a judicial or quasi-judicial person, and consequently, certiorari will not lie and this application fails.

**PARKER, J.:** I agree that this motion fails, and I can give my reasons very shortly. Under the London Cab Order, 1934, para. 30, the commissioner is given very wide powers, and it is clear that he may revoke a licence if he is satisfied by reason of any circumstances arising or coming to his knowledge after the licence is granted that the licensee is not a fit person to hold it. Accordingly, he is in no way bound to hear evidence or hold an inquiry or cause any inquiry to be held. Should he revoke a licence on the report, for instance, of a police constable

(1) [1952] 1 All E.R. 480; [1952] 2 Q.B. 413.

alone, this court could not interfere whether by certiorari or otherwise. Indeed, as I understand it, counsel for the applicant conceded that that was the position. In the present case, as my Lord has said, the commissioner, having decided to revoke the licence, gave the applicant an opportunity of appearing before a departmental committee and being confronted with the police constables. Can it make any difference that he said: "I am satisfied, but will you, the committee, confront the applicant with the police constables and report back to me if you think there is anything more I ought to consider". In my view, if he is not bound to hear any evidence from the applicant himself or on his behalf, the committee cannot be bound to do so. A different position might arise—I only say might arise—if the commissioner were to say, in effect: "I have not the necessary evidence on which to decide this, and I will cause an inquiry to be held so that I can have a report on the facts". The position might then be different, but that is far from the facts of this case where the commissioner has come to his decision that the licence should be revoked and is merely giving the applicant an opportunity of, in effect, cross-examining the constables concerned. In these circumstances, I find it quite unnecessary to consider all the cases that have been cited as to when certiorari will lie. It is clear that it does not lie in this case. I should add that counsel for the applicant further argued that the remedy of certiorari should lie in this case in that the decision here was not the decision of the commissioner, but was the decision of the assistant-commissioner or of the committee. In my opinion, there is nothing in this contention because it seems to me perfectly clear, on the facts, that the decision here was, and would in any event be, whatever the committee did, the decision of the commissioner himself, and the fact that that decision is communicated orally by the assistant-commissioner or somebody else cannot in any way invalidate the decision of the commissioner. I agree that this motion fails.

**DONOVAN, J.:** I agree. Had the commissioner himself immediately acted on the view he had formed that the applicant was not fit to hold a licence and at once revoked it, it is admitted on behalf of the applicant here that the writ would not lie, such revocation being purely an administrative act. Having regard to the language of the London Cab Order, 1934, para. 30, I think that admission is right. Instead of doing that, however, the commissioner referred the matter to a committee, giving instructions that the applicant and the two police officers should be there and that the licence should be revoked unless something transpired which, in the committee's view, might lead to a re-consideration by the commissioner of his decision. I agree that that involved hearing the applicant and the two police officers and coming to a view as to whether the latter's allegations had in any way been shaken.

The question here is whether, in discharging their duty, the committee were performing a judicial or quasi-judicial act. It can, of course, with some degree of plausibility, be argued that they were. They were in a sense hearing two sides to a dispute, viz., whether the applicant had allowed his cab to be used for improper purposes, and so it is said that, although the act of revoking the licence may be an administrative one, yet, if the commissioner causes an inquiry to be held at which evidence is taken and weighed, the rules of natural justice must be observed, and each side must be allowed to call witnesses, particularly the man whose livelihood is at stake. That argument has some force, and if the commissioner had set up an inquiry, as **PARKER, J.**, has just said, charging it to hear evidence and report its finding to him so that he might decide whether to revoke the licence or not, then, in my view, such a committee would be acting judicially, and would have to observe the rules of natural justice. Suppose, on the other hand, the commissioner, having already taken a decision to revoke



the licence, called in two or three members of his staff and said: "I have decided to revoke this licence, but before I implement that decision, just see Parker and the two policemen and hear what each has to say, and then, if you think I ought not to revoke, let me know", would the ensuing inquiry be a judicial or quasi-judicial one? If so, one is very near the position when every policeman who is taking notes of the statements made by each party to a street collision or some other untoward happening which might lead to a prosecution would be said to be acting in a judicial or quasi-judicial role. On the contrary, as it seems to me, he is performing an administrative act simply for the purpose of reporting to his superiors, and none the less so because it involves hearing, noting, and reporting allegation and counter-allegation.

If that be right, the question here is whether the licensing committee were really doing anything more. In the circumstances of this case, I think they were not. They were to see the policemen and Parker. They were to hear their allegations and counter-allegations and to report if they thought the result would or might change the commissioner's decision to revoke. In doing that they were, in my opinion, simply taking a share in the administrative acts culminating in the revocation of the licence, and that share did not involve that they were taking part in judicial or quasi-judicial proceedings. Had it been otherwise, I think the applicant should have been allowed to call the witness Gray, whose evidence might have been that the taxi-meter showed 8s. 3d. at midnight and thus might have conflicted with the evidence of the officers that it showed nothing. This was a material issue, since, if Gray convinced the committee that he was right, the reliability of the two police officers as witnesses would have been at least to some degree affected. That point, of course, does not arise once the conclusion is reached that this is not a proper case for the issue of the writ.

I would add, on the alternative argument that the commissioner wrongfully delegated his power of revocation to the assistant-commissioner or the licensing committee, that on the facts as disclosed by the commissioner's affidavit, the commissioner took the decision to revoke and simply communicated it through the assistant-commissioner, and in this I see no delegation of authority.

I agree that the application must be dismissed.

*Motion dismissed.*

Solicitors: *Philip Conway, Thomas & Co.* (for the applicant); *Solicitor, Metropolitan Police* (for the respondent).

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 22, 1953

## WAITE v. MARYLEBONE BOROUGH COUNCIL

*Street—Importuning for purpose of taking or selling photographs—Expansive gestures—Obstruction—Persistency.*

A borough council made a by-law which provided: "No person shall in any of the streets or public places referred to in the schedule . . . importune any person for the purpose of taking or selling any photograph."

The defendant stood in front to a man who was walking along the pavement, spoke to him, and raised his camera as if to take his photograph. The man was forced to walk round the defendant in order to pass him. This procedure was repeated in respect of two women, and again when another woman passed by. A soldier then agreed to have his photograph taken. A metropolitan magistrate convicted the defendant of an offence against the by-law, but on appeal by the defendant, the appeal committee of quarter sessions held that "importuning" involved more than "offering an invitation" and meant exercising some kind of pressure in the form of expansive gestures or obstruction or following a person after he had passed by. They quashed the conviction. On appeal by the borough council to the Divisional Court,

HELD: that, even assuming the appeal committee had placed the true construction on the word "importune," there was abundant evidence that the applicant had importuned passers-by. The appeal, therefore, must be allowed and the conviction restored.

CASE STATED by the appeal committee of London Sessions.

An information was preferred at Marylebone Magistrate's Court by the Marylebone Borough Council charging Albert Waite, a street photographer, with unlawfully importuning persons for the purpose of taking photographs at Marylebone Road on September 13, 1952, contrary to a by-law made by the council pursuant to s. 146 of the Local Government Act, 1933. The by-law provided: "For the good rule and government of the metropolitan borough of Marylebone . . . (1) No person shall . . . in the streets or public places referred to in the schedule . . . importune any person for the purpose of taking or selling any photograph." Marylebone Road was one of the streets included in the schedule. The magistrate convicted the defendant, who appealed to quarter sessions, where it was found that on Sept. 13, as a man was walking along the pavement, the defendant stood in front of him, spoke to him, and raised his camera as if to take his photograph. He was about three yards in front of the man, who was forced to walk round the defendant in order to pass him. This procedure was repeated in respect of two women, and again when another woman walked by. A soldier agreed to have his photograph taken and posed against the wall of Madame Tussaud's. The appeal committee came to the conclusion on the true construction of the by-law that the word "importuning" involved more than "offering an invitation" and must mean exercising some kind of pressure, whether that pressure took the form of expansive gestures or obstruction or following a person after he had passed by. They, therefore, quashed the conviction, and the council appealed.

*Mervyn Griffith-Jones* for the council.

*James Burge* for the defendant.

LORD GODDARD, C.J.: This is a Case stated by the appeal committee of the County of London Quarter Sessions, before whom the appellant was prosecuted for a breach of the by-law passed by the borough of St. Marylebone and duly confirmed by the Home Secretary, which is in these words:

"No person shall in any of the streets or public places referred to in the schedule to this by-law importune any person for the purpose of taking or selling any photograph."

The appeal committee find that, on the day on which it was alleged that he committed a breach of the by-law,

"as a man walking along the said pavement approached the appellant, the appellant stood in front of the man, spoke to the man, and raised his camera to his, the appellant's eye, as if to take a photograph of the man. The appellant was then two or three yards away from the man, and, by his aforesaid actions, caused the man to walk round him as the man passed him by and walked on. Shortly afterwards, as two women walking along the said pavement approached the appellant, the appellant stepped in front of them, spoke to them and raised his camera to his eye as if to take a photograph. The two women passed him by and walked on. Shortly afterwards another woman walking along the said pavement approached the appellant, and, as she did so, the appellant repeated the same procedure. The said woman passed him by and walked on. Apart from the fact that the appellant stood in front of the persons referred to above and thereby caused them to walk round him, in none of these cases did the appellant make any endeavour to bar the progress of these persons or to continue speaking to them, nor did he follow them after they had passed by."

Then the committee set out the case of a soldier who did stop to have his photograph taken. The committee came to the conclusion that, on the true construction of this by-law,

"the word 'importune' must involve something more than just offering an invitation—that it must mean exercising some kind of pressure, whether that pressure takes the form of words, or expansive gestures, or obstruction in the sense of getting in another person's way, or following a person after that person had passed by."

In my opinion, even if that is the true meaning to put on the word "importune", there is abundant evidence that the appellant did importune, did get in people's way, and did use expansive gestures—which is a question of degree—and that he was doing this persistently to everybody who came by. If that is not importuning, I do not know what is. I am not going to express any opinion, because it would only be obiter, whether a street photographer can carry on his business at all in view of this by-law. I think it is possible he can carry on some business, but I am certain that such a man is meant to be stopped from "touting" in the street for custom, and, therefore, I think the magistrate was right in convicting the defendant in the present case, the committee were wrong in quashing the conviction, and this appeal succeeds.

PARKER, J.: I agree.

DONOVAN, J.: I recognise that it is an important matter for the defendant, but what he did was to importune for the purpose of taking photographs, and accordingly, I agree with the proposed judgment.

*Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co.* (for the council); *Bennett & Bennett* (for the defendant).

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 21, 22, 1953

REG. v. TWICKENHAM RENT TRIBUNAL. *Ex parte* DUNN

*Rent Control—Reduction of rent—Application by deserted wife in respect of husband's flat—Landlord and Tenant (Rent Control) Act, 1949 (12 and 13 Geo. 6, c. 40), s. 1 (1).*

The applicant had been deserted by her husband and granted maintenance in the High Court for herself and her child. Her husband was the tenant of a rent-controlled flat at Chiswick, and the applicant applied to the Twickenham Rent Tribunal for an order for the reduction of the rent of the flat on the ground that, having been deserted by her husband and left as his licensee in the flat, which was the matrimonial home, she had a right of her own derived from him to assert on his behalf the tenant right in the flat and make the application to the tribunal. The husband had refused to make an application. On Feb. 14, 1953, the tribunal decided that it had no power to consider her application, and the applicant obtained leave to apply for an order of mandamus directing the tribunal to hear and determine it.

HELD: that, though a wife deserted by her husband had a right to remain in possession of rent-controlled premises as long as she paid the rent and performed the obligations of the letting, she was a licensee of a very special character, not clothed with any special rights, and was not her husband's agent; the only person who could apply to the rent tribunal was the tenant; the wife was not the tenant or the tenant's agent; and, therefore, the tribunal had come to a right decision, and the application must be refused.

MOTION for mandamus.

*Willis, Q.C., and Laughton-Scott* for the applicant.

*R. M. N. Band* for the landlord.

*J. P. Ashworth* for the rent tribunal.

LORD GODDARD, C.J.: Counsel for the applicant, Barbara Louise Dunn, move for an order of mandamus directing the Twickenham Rent Tribunal to hear and determine an application made by the applicant

"as agent for and on behalf of her husband Douglas William Dunn, pursuant to s. 1 of the Landlord and Tenant (Rent Control) Act, 1949, to determine the reasonable rent of Flat 2, Royston Court, 1 Spencer Road, Chiswick, in the county of Middlesex, whereof the said Douglas William Dunn is the tenant and one A. Stokes the landlord."

The house, to which the Rent Control Acts apply, was demised by Mr. Stokes to Mr. Dunn at a certain rent. Mr. Dunn and Mrs. Dunn have parted, and I assume that the husband deserted the wife, although I do not know that that point has been decided by any court. Mrs. Dunn, having been granted maintenance by the High Court to the amount of £500 a year, and finding that the rent reserved imposed a strain on her, applied to the tribunal to reduce the rent. She first of all applied in her own name, and that application was rejected by the tribunal—in my opinion, rightly—because she was not the tenant of the house, so she sought to avoid the consequences of that decision by applying on behalf of her husband as his agent. Such a case has never arisen before and is illustrative of the inconveniences and difficulties which arise where one has to apply a statute which interferes with the freedom of contract.

This house is subject to the Rent Restrictions Acts and so the husband cannot



sue his wife for ejectment, for a series of decisions, more particularly, *Old Gate Estates, Ltd. v. Alexander* (1), *Middleton v. Baldock* (2) and *Bendall v. McWhirter* (3), have established that, if a wife is deserted by her husband, she has a right to remain in the matrimonial home and, so long as she pays the rent and performs the covenants, if that matrimonial home is subject to the Rent Restrictions Acts, she cannot be dispossessed. As I understand the ratio of the decisions in the Court of Appeal she becomes a licensee of a very special character. The mere fact that she is the wife gives her an implied authority from the husband to remain in possession of the premises, and she can remain in possession so long as she pays the rent and performs the covenants. The husband has given notice in the present case, as husbands have done in other cases which have been the subject of decisions in the Court of Appeal, that he does not want to remain in the house. It has not yet, so far as I know, been decided whether in those circumstances the husband who is willing to give up the house to his landlord, but cannot give the landlord vacant possession because the wife is there, remains liable for the rent, but I will assume for the moment that he does. He does not pay it, but the wife does, and so long as the wife pays the landlord the rent, the landlord cannot, by reason of the Rent Restrictions Acts, recover possession of the house.

That, however, does not seem to me to make the wife the husband's agent. The husband may have given the wife authority to remain in the house, but, so far as I can see, he has not given her authority to act as his agent. It is a very special and anomalous character with which, by the law as laid down by the Court of Appeal, the wife has been clothed. Her licence to remain in possession cannot be revoked by the husband and her possession cannot be assailed by the landlord so long as he receives the rent, but I cannot see that these cases in the Court of Appeal have clothed her with any further positive rights. The only passage which, I think, can be prayed in aid is a passage in the judgment of DENNING, L.J., in *Bendall v. McWhirter* (3), in which he said:

"The authority [to remain in the house] is, of course, purely personal to her. She alone can exercise it. She cannot assign it. It does not give her any legal interest in the land. She may, perhaps, sub-let some of the rooms so as to help keep herself, but even then, she does so, not out of any legal interest of her own in the land, but on the presumed authority of her husband."

No other judgment of any lord justice has gone as far as that, and it should be observed that that is only dictum. The learned lord justice does not purport to decide that the wife can sub-let some of the rooms; he only says that, perhaps, she may sub-let some of the rooms. I think that point is left open, and, so far as the position of the wife as agent for the husband is concerned, I know of no doctrine of the common law which confers an authority on the wife other than an authority to pledge her husband's credit for necessities. That, I think, is the extent of the authority which a wife has as agent for her husband. She can, for instance, taking a case which is not complicated by the Rent Restrictions Acts, if she is deserted by her husband, take rooms, or lodgings, or, possibly, a house on the credit of her husband if she can find anybody who will let premises to her on the terms that he might have to recover the rent from the husband on the ground that the wife had authority to pledge his credit.

Speaking for myself, I am not prepared to extend the privileges or the position

(1) [1949] 2 All E.R. 822; [1950] 1 K.B. 311.

(2) [1950] 1 All E.R. 708; [1950] 1 K.B. 657.

(3) [1952] 1 All E.R. 1307; [1952] 2 Q.B. 466.

of the wife to the extent that she can exercise a right which her husband as tenant could have exercised, because she is not the tenant of the house. The only person who can apply to have the rent reduced is the tenant. The cases, at any rate, decide one thing, and that is that the wife is not the tenant of the house, and, if she is not the tenant of the house, I do not see myself how she can get the right to go to the tribunal and ask for a reduction. I do not think that it is desirable to confer that right on her. After all, if a person takes a house and agrees to pay the rent, many people would consider that he ought to pay the rent he has agreed to pay. The husband in this case has never complained about the rent he agreed to pay. He has not asked, and does not want to ask, the tribunal to say that the landlord is charging an excessive rent. Why should the wife be entitled, because she chooses to remain in the house, to say to the tribunal: "The rent which my husband agreed to pay and did pay and has always been willing to pay as long as he lived in the house is excessive"? Why should she be entitled to ask the tribunal to break a contract which the husband made with the landlord and has never sought to repudiate? I can find nothing in the cases in the Court of Appeal which oblige, or, indeed, entitle, me to hold that the wife is the agent for the husband to exercise any right which the husband might exercise. The only agency there is in a wife is to pledge the husband's credit in a case where the husband has not provided for her. This wife has been provided by the husband with £500 a year and £100 for the child of the marriage. That is by an order of the court, so she cannot say that she has not got provision made for her by her husband. I do not think that she has shown any decision which would oblige me to hold that she has any authority from her husband, either express or implied, merely because she is clothed with this particular special position as a licensee, entitling her to apply to the tribunal. In my opinion, the tribunal were justified in refusing to entertain her application, and this motion must fail.

**PARKER, J.:** I agree so entirely with what my Lord has said that I do not think I can usefully add anything.

**DONOVAN, J.:** Section 1 of the Act of 1949 allows a tenant to make an application to the tribunal for reduction of rent. The applicant before us is not the tenant. The Landlord and Tenant (Rent Control) Regulations, 1949 (S.I., 1949, No. 1096), reg. 7, made under the Act contemplates that at the hearing of an application the tenant may be represented by his agent. The applicant before us is not her husband's agent. We are asked to say that she should be treated as the agent of her husband for the purposes both of making the application and prosecuting it although the husband repudiates any such agency, and it is said that we should be justified in so doing because of the decisions which lay down that a wife who has been deserted by her husband has a right to "live" or "stay" in the matrimonial home on the terms of her husband's tenancy. It is merely a logical extension of this right, it is argued, to allow her to exercise her husband's statutory right to go to the rent tribunal. The decisions in question are directed to preserving a deserted wife's right to remain in the matrimonial home, and it is not necessary to the preservation of that right that the wife should have a further right to apply for reduction of rent. If that were granted to her, it would, in my view, not be a logical extension of her rights as a licensee under a presumed irrevocable licence from her husband, but it would be a new departure altogether and a bridging of a void which has been left, wittingly or unwittingly, by Parliament. In my view, Parliament

alone can give the right which is sought here, and I, therefore, agree with the judgments already delivered. *Motion dismissed.*

Solicitors: *Willis & Willis* (for the applicant); *Arthur Robson* (for the landlord); *Solicitor, Ministry of Health* (for the rent tribunal).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 24, 1953

#### GODSTONE RURAL DISTRICT COUNCIL v. BRAZIL

*Town and Country Planning—Enforcement notice—Need to specify both date on which notice takes effect and period within which it must be complied with—Town and Country Planning Act, 1947 (10 & 11 Geo. 6, c. 51), s. 23 (2), (3). Town and Country Planning—Development—Permission to use land “for any purpose on not more than twenty-eight days in total in any calendar year”—Information charging unlawful use on Jan. 12, 1953, and on two dates, in December, 1952—Town and Country Planning General Development Order, 1950 (S.I., 1950, No. 728), art. 3 (1), sched. I, Part I, class IV, para. 2.*

The respondent was the owner of a piece of land on which, in 1951 or during January, 1952, she stationed a caravan in which from that time she lived. On Oct. 31, 1952, the local authority, acting on behalf of the local planning authority, served on her a notice purporting to be an enforcement notice under the Town and Country Planning Act, 1947, s. 23 (1), which required her to remove the caravan “within seven days after the expiry of twenty-eight days from the date of the service of this notice”. As she did not comply with the notice, in February, 1953, the local authority preferred an information against her charging her with an offence against s. 24 (3) of the Act in that on Dec. 17 and 30, 1952, and on Jan. 12, 1953, she had unlawfully used her land as a site for a caravan without grant of permission under Part III of the Act of 1947 and in contravention of the enforcement notice.

**HELD:** (i) under s. 23 (2) and (3) of the Act of 1947, an enforcement notice should specify two periods: (a) the period at the expiration of which the notice would take effect, and (b) the period allowed for the execution of the work after the notice had taken effect, and, as the notice of Oct. 31, 1952, did not specify the former period, it was invalid.

*Burgess v. Jarvis* (1952) (116 J.P. 161), followed.

(ii) by the Town and Country Planning General Development Order, 1950, art. 3 (1), and sched. I, Part I, class IV, para. 2, the respondent was permitted to use her land for any purpose on not more than twenty-eight days in total in any calendar year, and, therefore, the information was, on the face of it, bad as it alleged an unlawful use of the land on Jan. 12, 1953, although twenty-eight days of 1953 had not then elapsed, and it was also bad for duplicity as it alleged, not only an offence in 1953, but also offences in 1952.

#### CASE STATED by Surrey justices.

At a court of summary jurisdiction sitting at Dorking an information was preferred by the appellant council, through their deputy clerk, charging the respondent with an offence against the Town and Country Planning Act, 1947, s. 24 (3), in that on Dec. 17 and 30, 1952, and on Jan. 12, 1953, she unlawfully used her piece of land, known as the Platt, Lone Oak Estate, Smallfield, Burstow, Surrey, as a site for a caravan for the purpose of human habitation without the grant of permission under Part III of the Town and Country Planning Act, 1947, and in contravention of an enforcement notice which was served on her on Oct. 31, 1952.

At the hearing of the information on Feb. 18 and Mar. 18, 1953, it was proved or admitted that, at some date in 1951 or 1952 which was before Jan. 31, 1952, the respondent stationed on her land a caravan for living purposes and resided therein until Oct. 31, 1952, when the council served on her a notice which purported to be an enforcement notice, and which required her to discontinue the use of the land as a site for the caravan and to remove the caravan from the land "within seven days after the expiry of twenty-eight days from the date of the service of this notice upon you"; that the respondent did not apply for planning permission under Part III of the Act of 1947 and did not appeal against the notice; and that she did not discontinue the use of the land as a site for a caravan or remove the caravan. The council contended, *inter alia*, that the enforcement notice was in accordance with s. 23 of the Act of 1947 and that the offence was proved. The respondent contended that the notice was invalid in that (a) it failed to specify the two periods required to be specified by s. 23 (2) and (3) of the Act, viz., (i) the period, not being less than twenty-eight days, at the expiry of which it was to take effect, and (ii) the period within which the use was to be discontinued and the caravan removed, and (b) it failed to specify the former use of the land. The justices, being of the opinion that the respondent's contentions were correct, held that the notice was not an enforcement notice and dismissed the information. The council appealed.

*Scarman* for the council.

*J. Deakin James* for the respondent.

**LORD GODDARD, C.J.**, stated the facts and continued: By the Town and Country Planning Act, 1947, s. 23 (3), an enforcement notice is to take effect at the expiration of such period, not being less than twenty-eight days after the service thereof, as may be specified therein. In *Burgess v. Jarvis* (1) the Court of Appeal held that, under s. 23 (2) and (3), the enforcement notice should specify two periods: (i) the period at the expiration of which the notice took effect, and (ii) the period within which the particular steps for restoring the land to its original condition had to be taken. That decision was followed by this court in *Mead v. Plumtree* (2). The notice served in the present case is as follows:

"Whereas it appears to the rural district council for the rural district of Godstone . . . acting for and on behalf of the Surrey County Council, the local planning authority, that the following development of land has been carried out after July 1, 1948, without the grant of permission required in that behalf . . . viz., the placing of a movable structure, to wit, a caravan, which is used for human habitation on the land specified in the schedule hereto which said caravan has remained thereon for more than twenty-eight days in total in the year 1952 . . . And whereas it is considered expedient, having regard to the provisions which will be required to be included in the development plan for securing the proper planning of the area . . . that, for restoring the land to its condition before the development took place, you should take the steps hereinafter specified within the period also hereinafter specified. Now therefore the council do hereby give you notice, in pursuance of their powers for and on behalf of the local planning authority under s. 23 and s. 24 of [the Act of 1947]: (a) to discontinue the use of the said land . . . as a site for the said

(1) 116 J.P. 161; [1952] 1 All E.R. 592; [1952] 2 Q.B. 41.

(2) 116 J.P. 589; [1952] 2 All E.R. 723.



caravan or movable structure; (b) to remove from the said land the said caravan or movable structure stationed thereon within seven days after the expiry of twenty-eight days from the date of the service of this notice upon you."

The council probably intended that the work should be done within thirty-five days of the service of the notice, but they did not say that the notice would take effect at the expiration of twenty-eight days from the service thereof. The object of telling the person on whom the notice is served when it is to take effect is to give him notice of the period in which he can appeal. In my opinion, therefore, this notice does not comply with the decision of the Court of Appeal in *Burgess v. Jarvis* (1) that an enforcement notice should specify both the date when it is to take effect and the period within which the work is to be done after the notice has taken effect, and, therefore, the decision of the justices on this point was right.

Counsel for the respondent raised a second point. The information is in these terms:

" . . . for that she did on Dec. 17 and 30, 1952, and on Jan. 12, 1953, unlawfully use her own piece of land . . . as a site for a caravan for the purpose of human habitation without the grant of permission in that behalf under Part III of the Town and Country Planning Act, 1947, and in contravention of an enforcement notice."

By the Town and Country Planning General Development Order, 1950, art. 3 (1), and sched. I, Part I, class IV, para. 2, the following development is permitted without the permission of the local planning authority or the Minister of Town and Country Planning, subject to certain conditions which are not relevant in the present case:

"The use of land . . . for any purpose on not more than twenty-eight days in total in any calendar year, and the erection or placing of movable structures on the land for the purposes of that use."

By reason of this permission the respondent was entitled to use her land as a site for a caravan on twenty-eight days in any calendar year, and, therefore, on the face of it, the information is bad, as it alleges that she was unlawfully using the land as a site for a caravan on Jan. 12, 1953, although twenty-eight days of 1953 had not then expired. Moreover, it seems to me that, as the information alleges offences in 1952 and an offence in January, 1953, it must be alleging more than one offence. For these reasons, I think that the information is bad and that the justices were right in dismissing it.

**PARKER, J.:** I agree. In my view, the enforcement notice sets out only one of the periods which is required to be set out by s. 23 (2) and (3) of the Act of 1947, namely, the period during which the work must be done. Counsel for the appellant council contended that it was possible to read, and that one should read, the enforcement notice as specifying the two periods. I cannot agree with that. These notices are served on members of the public who do not know, although, no doubt, they are expected to know, all the provisions of the Act, and, in my view, the notices should set out clearly (i) the period at the expiration of which the notice is to take effect, and (ii) the period after the notice takes effect during which the work is to be done. This enforcement notice does not do so.

(1) 116 J.P. 161; [1952] 1 All E.R. 592; [1952] 2 Q.B. 41.

**DONOVAN, J.:** I also agree, although I was at first disposed to take the view that the enforcement notice was good.

*Appeal dismissed.*

Solicitors: *Sharpe, Pritchard & Co.* (for the appellant council); *Langhams & Letts*, agents for *Hart, Scales & Hodges*, Dorking (for the respondent).

T.R.F.B.

### PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

June 25, 1953

#### WAKEFORD v. WAKEFORD

*Husband and Wife—Maintenance—Amount—Amount based on desire of justices to force husband to grant wife a tenancy of the matrimonial home.*

In September, 1951, the husband left the wife, but he continued to pay the rent and the rates and for the lighting of the flat occupied by the wife which formed part of a building of which he was the leaseholder. In addition he paid her £3 a week for her maintenance. The wife offered to pay the husband £1 a week in return for a tenancy of the flat, but the husband refused to grant her a tenancy. The wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging the husband with desertion, which he admitted. The justices adjourned the case to give the husband an opportunity of granting the wife a tenancy of the flat, and when he refused to do so they awarded the wife £4 a week maintenance, intimating to the husband that, if he granted the wife a tenancy, they would consider an application by him for a variation of the amount.

**HELD:** the justices had no right to increase the amount of the award in order to force the husband to grant the wife a tenancy, and, as, in doing so, they had erred on a matter of principle, the sum awarded would be reduced to £3 a week.

**APPEAL** by the husband against a maintenance order made by Mortlake (Surrey) justices on Dec. 2, 1952.

The parties had lived together in a flat in a building of which the husband was the leaseholder. In September, 1951, the husband left the wife, but he continued to pay the rent and rates of the flat and for the electricity, and, in addition, he paid the wife £3 a week for her maintenance. The wife offered to pay the husband £1 a week for a tenancy of the flat, but this was refused by the husband. In 1952 the wife issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, charging the husband with desertion. On Nov. 11, 1952, before the justices the husband admitted desertion, and in cross-examination he said he did not want to allow the wife £3 a week and take back £1 a week for rent. The justices adjourned the hearing in the hope that the husband would grant the wife a tenancy of the flat. At the adjourned hearing on Nov. 25, 1952, the husband offered to grant the wife a licence to occupy, but not a tenancy of the flat, and the case was again adjourned. On Dec. 2, 1952, the husband not having changed his mind, the justices made an order that he should pay £4 a week to the wife for her maintenance. Against that award the husband appealed.

*Stinson* for the husband.

*Miss C. Colwill* for the wife.

**LORD MERRIMAN, P.:** It is said that in the circumstances of this

case the amount of £4 was excessive, and that on the figures, which in substance are uncontroversial, so far as the particular point in question is concerned, the amount should be £3. Let me say at once that where, on the respective means of the parties, a particular figure appears to be sustainable, even though this court may think that it is a shade high or a shade low, as the case may be, we are very reluctant to interfere unless it appears that some question of principle is involved. Though I express no concluded opinion about it, the sum of £4, regarded merely in the light of the test of the husband's earnings and the fact that the wife was not earning substantial money, might be a difficult figure to attack, but, in my opinion, it is clear that a serious question of principle arises. The husband, in partnership with another man, owns two shops, one in Tooting, and the other in Barnes. He has a lease of the premises at Barnes on the ground floor of which is the shop, and he sub-lets that floor to the partnership. The wife lives rent free in a flat on the first floor. The evidence, about which there is no dispute, is that the husband pays the rates on the whole building and pays for the lighting of the flat. The value of the flat—rent, rates and light free—is £1 a week. That figure is common ground. The husband put that figure on it; the wife, who is paying nothing, offered to pay that precise sum if she could get a tenancy of the flat instead of being allowed indefinitely to go on living there. That is where the question of principle arises.

After the figures had been gone into, the justices adjourned the case for a week, expressing the hope that an agreement as to the wife's tenancy might be made because they felt that she should have some security of tenure. The husband had just said in cross-examination by counsel for the wife:

"I do not want to allow my wife £3 and take £1 back for rent [being the figure the wife had offered] because she has said she would see me in the gutter."

The justices evidently thought (this is a matter about which there can be no doubt) that they were entitled to put some pressure on the husband to give his wife the tenancy which she sought and he refused. In passing, I may say that, apart from any question whether the wife would take undue advantage of becoming the husband's tenant, there are obvious circumstances in which, from a business point of view, it might be inconvenient to tie this flat up with a tenancy of any substantial duration. After all, a situation might easily arise in which, for some business reason, it might be desired to get rid of the ground floor premises, which would be facilitated if the whole of the premises were free. There was a further argument after the week's adjournment. At the end of it the justices decided to make an order of £4 a week, it being clear that the wife was not going to obtain the security of tenure which they thought she ought to have.

In due course, for the purposes of this appeal, the justices' clerk was asked to set out the reasons, and he says that, as the husband had admitted desertion, he assumed that what was meant was the reasons for the amount of the order. This, he says, was based on the respective earnings of the parties. If the matter stood there, it might be difficult, if not impossible, for this court to intervene, but the statement of the reasons goes on:

"As to the security of the wife's living accommodation [the justices] felt that the wife's position would be safer if protected by an agreement for the sub-letting of the premises than by a licence, but intimated that should any offer as to an agreement of tenancy be made by the husband they would consider a variation of the financial part of the order on application by your client."

It is not difficult, I think, to penetrate the thin veneer by which the decision of the justices is covered. On the present basis the wife is in occupation of a flat provided by the husband which is worth £1 a week to her, and in actual cash her maintenance should be £3. If for any reason her occupation of the flat is terminated by the husband, the loss of the accommodation has to be made up to her, as could, and, I think, should be done, by an order increasing the amount of the cash benefit by whatever sum is necessary to produce alternative accommodation on a comparable basis. Instead of that, the justices have ordered a payment of £4 in order to force the husband to give a tenancy of unknown duration, with the suggestion that, if he does give such a tenancy, the cash part of the order will be reduced on application by him.

In my opinion, they had no right whatever to make an order on that basis, and in doing so have clearly gone wrong on a matter of principle. They have increased the cash amount of the order by £1 more than it ought to be, having regard to the fact that the husband has supplied the wife with this residence rent, rates and lighting free, in order to force him to change that permissive occupation into a formal tenancy, the hypothesis being that the wife would have to pay £1 a week for the tenancy. The facts have only to be stated, in my opinion, to make it apparent that the justices have done something which they had no right to do. This appeal should be allowed, and, as there is no dispute about the figures, we can safely take it on ourselves to reduce the amount of the order from £4 to £3.

**PEARCE, J.:** I agree. From the cross-examination it would appear that it seemed to the wife's counsel—and I do not think she now repudiates it—that the right figure for maintenance was £3, plus the use of the flat, but she was trying to get the husband to give her the security of a tenancy instead of merely allowing her to be there at his will. As he was obdurate the justices adjourned the matter. On the adjourned hearing the husband's counsel declined to give a tenancy, but offered a licence. Again the justices adjourned the matter in order that the husband might become willing to grant a tenancy. The case was finally heard on Dec. 2, 1952. The husband being still obdurate, the justices made an order for £4. Counsel for the wife suggests that the justices had in mind the fact that the wife might be turned out of the flat, and that then her living expenses would be greater. The justices had no reason to believe that the husband was about to turn her out. If they were providing for that contingency (which has not yet occurred) the order is in the present circumstances too high. In my view, they were attempting to force the husband to grant a tenancy that he did not wish to give by fixing the maintenance at £1 higher than it ought to be, with the allurements of a possible reduction if he would grant a tenancy. However worthy may be the motives which led them to seek that the wife should have security of tenure, that is no justification for using an excessive order as a means of making the husband take the course which they thought was the right one. For these and the reasons my Lord has given, I agree that the appeal should be allowed, and that the amount of £4 should be reduced to £3.

*Appeal allowed.*

Solicitors: *Sutton-Mattocks & Co.* (for the husband); *Musson & Co.* (for the wife).

G.F.L.B.



QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 20, 21, 1953

REG. v. STATUTORY VISITORS TO ST. LAWRENCE'S HOSPITAL,  
CATERHAM. *Ex parte* PRITCHARD

*Mental Deficiency—Detention order—Opinion of statutory visitors recommending continuance—Motion to quash—Certiorari—Mental Deficiency Act, 1913 (3 and 4 Geo. 5, c. 28), s. 11 (4) (a).*

Janet Edith Pritchard, aged twenty, a patient at St. Lawrence's Hospital, Caterham, acting by her mother as next friend, obtained leave to apply for an order of certiorari quashing the report of the opinion reached by the statutory visitors to the hospital on May 29, 1953, under s. 11 of the Mental Deficiency Act, 1913, recommending her continued detention as a patient at the hospital. The ground of the application was that the visitors had refused to hear the patient's mother by counsel, or to allow the mother and her counsel to be present at the examination of the patient.

HELD: that the report was not the determination by a tribunal whose duty was to hear evidence and representations and to come to a judicial decision in approximately the same way as a court, but was only evidence to be taken into consideration by the Board of Control in deciding whether the detention order should be extended, and, therefore, certiorari would not lie in respect of the report, and the application must be refused.

Per curiam: Reports by medical and public health officers which were before the visitors ought not generally to be disclosed, but it was proper for the visitors to submit the documents for the consideration of the court whether they should be disclosed in the particular case.

MOTION by Janet Edith Pritchard, an infant, acting by her mother and next friend, Dolly Edith Roomer, for an order of certiorari to bring up and quash the report of the opinion reached by the statutory visitors of St. Lawrence's Hospital, Caterham, in the county of Surrey, on May 29, 1953.

On June 19, 1952, the infant pleaded Guilty before a metropolitan magistrate to a charge of larceny. She was remanded for a week for a medical report, and was then detained under s. 8 (1) of the Mental Deficiency Act, 1913. The infant appealed to quarter sessions which declined to interfere with the order of detention. On Aug. 19, 1952, the infant was taken to St. Lawrence's Hospital, Caterham. On May 29, 1953, the statutory visitors to the hospital, appointed under s. 40 of the Mental Deficiency Act, 1913, assembled to examine the infant for the purposes of making a report under s. 11 (4) (a) of the Act. They allowed the mother and her counsel to enter the room in which they had met, but they did not allow either of them to be present at the examination or to address them. In their report to the Board of Control the visitors recommended that the detention order should be extended.

The infant now applied for an order of certiorari to quash the report of the visitors' opinion, or, alternatively, to quash any confirmation or order of the Board of Control subsequently made on considering the report, on the grounds (i) that the statutory visitors failed to carry out their duty under s. 11 (4) (a) of the Act in that they failed to inquire from the mother and lawful guardian of the infant what means of care and supervision would be available to the infant if she were discharged, (ii) that the opinion of the visitors was not arrived at judicially in that neither the mother nor her counsel was allowed to address them before they reached their opinion, and neither the mother nor her counsel was allowed to be present while the visitors examined the infant, and (iii) that

the proceedings held by the visitors were null and void on account of denial of natural justice by the exclusion of the mother and her counsel.

*Sir Frank Soskice, Q.C., and Benenson for the applicant.*

*F. H. Lawton and Southall for the visitors.*

*S. B. R. Cooke for the Board of Control.*

**LORD GODDARD, C.J.:** Counsel for the applicant moves for an order of certiorari, to remove into this court and quash the report of the opinion reached by the statutory visitors on May 29, 1953, at St. Lawrence's Hospital, Caterham, in respect of Janet Edith Pritchard. The Mental Deficiency Act, 1913, s. 11, provides:

"(1) An order made under this Act that a defective be sent to an institution or placed under guardianship shall expire at the end of one year from its date, unless continued in manner hereinafter provided: Provided that in the case of any institution the [Board of Control] may by order direct that orders that persons be sent thereto shall, unless continued as hereinafter provided, expire on the quarter day next after the day on which the orders would have expired under the above provision. (2) An order shall remain in force for a year after the date when under the preceding provisions of this section it would have expired, and thereafter for successive periods of five years, if at that date and at the end of each period of one and five years respectively the board, after considering such special reports and certificate as is hereinafter mentioned and the report of any duly qualified medical practitioner who, at the request of the defective or his parent or guardian or any relative or friend, has made a medical examination of the defective and the means of care and supervision which would be available if the defective were discharged consider that the continuance of the order is required in his interests and make an order for the purpose: Provided that, where a defective was, at the time of being sent to the institution or placed under guardianship, under twenty-one years of age, the case shall be re-considered by the visitors appointed under this Act within three months after he attains the age of twenty-one years."

That proviso does not yet arise in this case because the infant has not attained the age of twenty-one years. It will be observed that on the clear terms of sub-s. (2) it is the Board of Control that has to come to a decision after considering "such special reports and certificate as is hereinafter mentioned" and also the report of any duly qualified medical practitioner, who, at the request of the defective or his parent or guardian, has examined the defective. Section 11 continues:

"(4) The special reports above mentioned shall be—(a) A special report by the visitors made within one month after having seen the defective as to his mental condition and the means of care and supervision which would be available if he were discharged, and stating whether, in the opinion of the visitors, the defective is still a proper person to be detained in his own interest in an institution or under guardianship."

It is now sought to quash the special report by the visitors. It seems to me that the first thing that has to be borne in mind in all these cases is: What is the scope of the order of certiorari? In these days certainly this court has no desire to limit the scope of the order of certiorari. Before modern legislation so enormously increased the number of orders and inquiries which are made by various government departments, certiorari only applied to what was strictly

an inferior court. The writ of certiorari which used to be issued from this court was directed to the inferior tribunal, whatever it might be, calling on that tribunal to return into this court the record and orders it had made or the particular process it was desired to question in order that this court might examine what had been done and see whether or not it was in accordance with law. In modern times the scope of the order of certiorari has been considerably increased, and in a well-known judgment in *Rex v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), ATKIN, L.J., said:

"Wherever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the [Queen's] Bench Division exercised in these writs."

It will be observed that there must be "authority to determine", and that the persons must be those who have a duty to act judicially, in which case, their orders, if they act in excess of their authority, can be reviewed by this court under the order of certiorari which has now taken the place of the writ. It is essential to remember, as we tried to emphasise recently in *Reg. v. Metropolitan Police Comr. Ex p. Parker* (2), that there must be something that can be called a determination which will affect the rights of the applicant and a tribunal whose duty it is to act judicially. It is not easy to give an exact definition of what is meant by "act judicially", but I should say that for this purpose it means a body bound to hear evidence from one side and the other. There need not be anything called strictly a lis, but the body would have to hear submissions and evidence by each side and come to a judicial decision approximately in the way that a court must do. Unless there is an order or a determination by the body to whom it is suggested the order should be directed the order of certiorari will not lie. Attempts are constantly made in this court nowadays to enlarge the order of certiorari beyond that which can possibly be allowed. We do not in any way desire to limit the control which this court can exercise over various bodies which are set up under a variety of statutes because it is very important that those bodies, though they may be given wide powers affecting the property of Her Majesty's subjects, should be controlled and kept within the bounds of the jurisdiction which has been conferred by Parliament. But if Parliament has put duties on, or given powers to, persons, it is not for this court to take away those powers unless we can find that the tribunal is exceeding its powers. The first question we have to decide in this case is whether the persons to whom this order is sought to be directed are a tribunal at all.

It appears clear to me, despite the authorities to which we have been referred, that these visitors are not, for this purpose, a tribunal at all and that they have no power to give a decision. The decision whether the infant is to remain in the hospital after the year has elapsed, that is to say, after Aug. 19, 1953, is to be the decision of the Board of Control, and these visitors' reports, which are prescribed in the Act, are no more than material which is put before the board to enable the board to come to a decision. The visitors have no power under s. 11 (4) (a) to say that this infant is to be detained after a year. All they have to do is to see her, to ascertain the means of care and supervision which will be available

(1) 88 J.P. 13; [1924] 1 K.B. 171.

(2) [1953] 2 All E.R. 717.

if she is discharged, and to state whether, in their opinion, she is a proper person to be detained in her own interest in the institution.

When the visitors assembled to consider this case the mother of the infant desired to be heard by them and to be represented by counsel. The visitors allowed the mother and her counsel to come into the room, but they did not hear her or her counsel in the way they would have been bound to hear her, if they had been a tribunal. If the tribunal was one which had power to come to a decision in the sense I have tried to explain, no doubt they would have heard her.

Where do we find that there is any obligation on the visitors to hear anybody? They are not entrusted with the duty of coming to a decision; that is the duty of the board. The board are told by Parliament what evidence or facts or matter they are to have before them when they come to a decision. It is always possible for the parent or guardian and the detained person himself to obtain the opinion of a duly qualified medical practitioner, who may or may not agree with the view put forward by the medical officer of the institution. To that, if it were put forward, no doubt the visitors would pay attention. Undoubtedly the board would pay attention to it. The secretary of the board has filed an affidavit in opposition to this motion in which there is set out the procedure the board follows and shows the care they take before they extend the order over a period of one year. In my opinion, it is abundantly clear that the visitors here are not a body against whom an order of certiorari will lie because they have no power to come to a decision. If the board come to a decision that this infant is to be detained, a question may then arise for our determination, but we cannot grant certiorari to bring up a report which is nothing more nor less than a piece of evidence to lay before the board. I have never heard of a case, and no case has been quoted, which shows that this court has ever granted certiorari to bring up a report.

Reliance was placed on *Rex v. Boycott, Ex p. Keasley* (1), which, it is said, is conclusive of this case. That case was decided under s. 31 of the Act of 1913, and deals with an entirely different matter. In my opinion, that decision has no application to this case. I think that there are certain matters with regard to that decision which some day may be considered by the Court of Appeal, but I do notice that counsel for the respondents in that case appeared to admit that the order was one which could be subject to certiorari, for HUMPHREYS, J., said:

"In my opinion, the order of certiorari ought to go in this case in regard to all three documents. In regard to the most important of those three—namely, the certificate of Oct. 5—as I understood the argument of [counsel for the respondents], he was not in a position to contend that, if that document was one which could not be allowed to stand, and ought not to stand, it was not a document which, in the circumstances, would fall within the language used by ATKIN, L.J., in *Rex v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (2), to which [LORD HEWART, C.J.] has referred. Therefore, as I understood his argument, he was admitting (and certainly not contending to the contrary) that, if that document was a document exhibiting the defects which it was alleged to exhibit, it might be the subject of this order of certiorari."

Section 31 provided:

"(1) The duties of a local education authority shall include a duty to

(1) [1939] 2 All E.R. 626; [1939] 2 K.B. 651.

(2) 88 J.P. 13; [1924] 1 K.B. 171.



make arrangements, subject to the approval of the Board of Education, (a) for ascertaining what children within their area are defective children within the meaning of this Act; (b) for ascertaining which of such children are incapable by reason of mental defect of receiving benefit or further benefit from instruction in special schools or classes; (c) for notifying to the local authority under this Act, the names and addresses of defective children with respect to whom it is the duty of the local education authority to give notice under the provisions hereinbefore contained. In case of doubt as to whether a child is or is not capable of receiving such benefit as aforesaid, or whether the retention of a child in a special school or class would be detrimental to the interests of the other children, the matter shall be determined by the Board of Education."

In *Rex v. Boycott, Ex p. Keasley* (1) the local authority had made arrangements with the local education authority with regard to the education of a boy who, it was reported, was a fit subject for a special school. His parents were aggrieved by that, and wanted to argue that he could be normally educated at an ordinary school. Section 31 continued:

"(2) The provisions of s. 1 of the Elementary Education (Defective and Epileptic Children) Act, 1899, shall apply with the necessary modifications for the purposes of this section."

Section 1 (1) of the Act of 1899 provided for arrangements to be made for defective and epileptic children and the manner in which they were to be made, and by s. 1 (3):

"For the purpose of ascertaining whether a child is defective or epileptic within the meaning of this section, a certificate to that effect by a duly qualified practitioner approved by the education department shall be required in each case. The certificate shall be in such form as may be prescribed by the education department."

I think it is desirable that some parts of the decision in *Rex v. Boycott, Ex. p. Keasley* (1) should be considered by the Court of Appeal especially with regard to the admission made by counsel which, speaking for myself, I do not feel convinced was right. But there the court treated as documents which could be brought up and quashed both the certificate, which had to be given under s. 11 (4) (b) of the Act of 1913 because it was a certificate which decided the question whether the boy was an imbecile, and a letter which, it appeared to the court, decided the question whether or not the local education committee should make provision for the child. But, as I say, that has nothing to do with this particular case because here we are dealing with another section which is worded in a different manner, and whether or not it would have been desirable, at the meeting held by the visitors, that the mother should be allowed to attend and make representations, is not a matter for this court. It is a matter for Parliament.

It seems to me that there is nothing in s. 11 which could be construed as saying that the visitors have to receive evidence or even to allow anybody to be present other than the patient. It seems to me that such an argument is inconsistent with the provisions of the section, which, I think, is intended for the guidance of the board in considering whether they are going to make an order for the detention of the patient under the Act. After the year has expired they are to get the opinion of the visitors, who are to see the patient and form their opinion of him. Then they are to have a certificate from the doctor of

(1) [1939] 2 All E.R. 626; [1939] 2 K.B. 651.

the institution or some other doctor who may be appointed for that purpose with regard to the condition of the patient. If the parent or guardian of the patient chooses to have the opinion of a medical practitioner, that, no doubt, has to be considered by the board, but the decision is to be the decision of the board and not the decision of the visitors. It is impossible, looking at the whole of the section, to say that the visitors are to hold anything which can be called an inquiry in the sense that persons shall be allowed to be present at the inquiry or that they shall hear evidence. They have to form an opinion and report to the board, and to say that their report, which is nothing more than a report of their opinion, can be brought up to be quashed by this court by means of certiorari would be extending the doctrine relating to certiorari to an unlimited and an unfortunate extent. It may be that many people might think that increased facilities should be given to persons interested in these cases to make representations to the visitors. They can make representations, no doubt, to the board. As I say, the board has set out in an affidavit the procedure they follow, and I have no doubt that their desire is to consider most carefully everything that can be placed before them before they come to a decision whether or not a patient is to be detained. I am not expressing any opinion in what circumstances, if any, certiorari will lie to the board; it is not a matter with which we are concerned at the present time.

I ought, perhaps, to say that reliance was placed by counsel for the infant on the Mental Deficiency Regulations, 1948, reg. 99, which, he says, recognises that the report of the visitors is a decision. I do not think it does. Regulation 99 deals with visitors acting not only under s. 11 (2) of the Act of 1913, but also under s. 11 (3) which is concerned with a different matter and provides:

"On such re-consideration the visitors shall visit the defective or summon him to attend before them and inquire into his mental condition and the means of care and supervision which would be available if he were discharged and into all the circumstances of the case, and, if it appears to them that further detention in an institution or under guardianship is no longer required in the interests of the defective himself, shall order him to be discharged: Provided that, if the visitors do not order his discharge, the defective or his parent or guardian may, within fourteen days after the decision of the visitors has been communicated to the defective and his parent or guardian, appeal to the board."

The visitors are given a power to make a decision within three months after the date when a patient attains the age of twenty-one, and the patient is not entitled to be discharged by reason of the order expiring, but merely on the fact that he has arrived at an age when either he will be discharged by the decision of the visitors or his parent or guardian can appeal to the board. That is simply a provision as to what is to happen when a person who has been committed while an infant comes of age, quite irrespective, it seems to me, of the period for which the order is to remain in force under s. 11 (2). If the order has come to an end, there is no need for the re-consideration, but, if the order has not come to an end, there is to be a re-consideration and the patient may be discharged if the visitors think it is no longer necessary that he should be detained. I think reg. 99 is, as the marginal note shows, giving what I may call an omnibus form of directions to the visitors when they are inquiring under s. 11 (2) and (3), and their duties and powers are quite different. Therefore, I do not think reg. 99 helps the infant in this case.

The result is that, in my opinion, this application is misconceived because certiorari will not lie, and, therefore, the motion must be dismissed. But I

want to say one other word on a matter of some importance before I part with this case. Two reports, both of which were properly before the visitors, one of the medical officer of the institution, and the other of an officer of the London County Council Public Health Department, were made exhibits to the affidavit which two of the visitors made and counsel for the visitors told us that he advised that those reports should be disclosed so that no suggestion could be made that the visitors were concealing anything from the court. I think, however, it should be understood that these reports are of a highly confidential nature. I do not suggest for a moment that Crown privilege can be claimed for them, but these are reports which officials are directed to make to enable the visitors to carry out the duty of forming an opinion under this Act. It is obvious that in making these reports matters of a private nature have to be dealt with. They have to report on the condition of the home, on their opinion of the parents, and also on the condition of the patient. It is most desirable that officers who have to make this kind of report to a body such as the visitors to be laid before the Board of Control should be able to report frankly and freely without any fear that the reports will be disclosed in courts of law or shown to persons, which might lead to actions of libel or something of that sort. The right course is that where reports have been before the visitors they should mention the facts and then submit those documents for the consideration of the court. We do not think it was ever intended that these reports should be treated as other than highly confidential and they are not to be disclosed unless the court thinks that a good purpose would be served. The reports should be in court so that the court can look at them. The court, if it thinks they ought to be shown to the other side, will so direct and, if necessary, will allow an adjournment for them to be considered. Although I can understand why they were produced, and we are not attaching any blame to counsel for the advice he gave to the visitors, we think for the guidance of the authorities in these matters that these reports ought not to be disclosed unless the court is of the opinion that they should be.

**PARKER, J.:** I agree. In my opinion, it cannot be too clearly understood that the remedy by way of certiorari only lies to bring up to this court and quash something which is a determination or a decision. In the passage my Lord has already quoted from *Rex v. Electricity Comrs. Ex p. London Electricity Joint Committee Co. (1920), Ltd.* (1), it is plain that **ATKIN, L.J.**, was dealing with a determination of questions affecting the rights of subjects; and in *Rex v. London County Council. Ex p. Entertainments Protection Assn., Ltd.* (2), **SCRUTTON, L.J.**, said:

"The writ of certiorari is a very old and high prerogative writ drawn up for the purpose of enabling the court of [Queen's] Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of certiorari is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be certified whether the decision is within the jurisdiction of the inferior court."

There has been a great deal of discussion and a large number of cases extending the meaning of the word "court". A number of such cases was referred to in *Reg. v. Manchester Legal Aid Committee. Ex p. R. A. Brand & Co., Ltd.* (3), but nothing in that case was intended to or did in any way enlarge the scope

(1) 88 J.P. 13; [1924] 1 K.B. 171.

(2) 95 J.P. 89; [1931] 2 K.B. 215.

(3) [1952] 1 All E.R. 480; [1952] 2 Q.B. 413.

of the remedy by way of certiorari so far as it affects this point. There must be a decision or determination. The sole question in debate in that case was the scope of the court or tribunal or body of persons, and nothing to do with whether it was or was not necessary to have a determination or decision.

In the present case, as the notice of motion itself states, the court is being asked to quash the report of the opinion reached by the statutory visitors. Parliament itself has pointed, it seems to me, the contrast between the duties of the visitors under s. 11 (2) of the Act, which is the case here, and under s. 11 (3). Section 11 (3) is clearly dealing only with the case of re-consideration when a patient comes of age and enables the visitors to arrive at a decision. Parliament uses the word "decision", and the visitors can order the discharge or the continued detention of the patient, and in the event of the latter decision there is a right of appeal to the board. When they are acting under s. 11 (3) the visitors are clearly coming to a decision, whereas under s. 11 (2) all they have to do is to report to the Board of Control whether in their opinion the defective is still a proper person to be detained in his own interests in an institution. Having made that report, it is then for the board alone to come to a decision on the matter and to direct, if the board so decides, a continuation of the detention order.

Counsel for the infant has pointed to the use of the word "decision" in the Mental Deficiency Regulations, 1948, and, in particular, in regs. 99 and 102. So far as reg. 102 is concerned, where it says that the visitors shall communicate their decision on the case to the board, it is perfectly plain that that regulation is dealing only with the case of re-consideration under s. 11 (3). By reg. 99 (2), however, it is provided that before making any decision the visitors shall consider a report as to a number of different matters. By the marginal note to reg. 99, it appears that it is an omnibus provision dealing with the way in which the visitors are to carry out their duties both under s. 11 (2) and (3). So far as s. 11 (3) is concerned, "decision" is the word used by the Act itself.

Counsel also relied on *Re x v. Boycott. Ex p. Keasley* (1). So far as that case is concerned, I would say two things. First, as my Lord has said, it was there conceded, rightly or wrongly, that the certificate in question was a document with regard to which certiorari would lie, but, quite apart from that, the case arose under different sections of the Act, and, in particular, under s. 31 which empowered, and, indeed, made it the duty of, the local education authority to ascertain what children within its area were incapable of receiving further benefit at school. It was further provided, by invoking the Elementary Education (Defective and Epileptic Children) Act, 1899, that in arriving at that decision they were required to have a certificate to the effect that the child was a defective by a duly qualified practitioner approved by the education department, and it was that certificate which was quashed in *Boycott's* case (1). By the Mental Deficiency (Notification of Children) Regulations, 1914, made under the Mental Deficiency Act, 1913, s. 2 (2), it was further provided that the local education authority, having got that certificate, had to consider the matter. If they thought it was a question of doubt, they had under, s. 31 (1) and reg. 2 (2), to refer the matter for the determination of the Board of Education. On the other hand, if they were satisfied that there was no doubt, they had, under reg. 2 (1), to send on the certificate with a covering letter to the proper department of the local authority, the Mental Deficiency Act, 1913 committee, and in *Boycott's* case (1) it is to be observed that the procedure was followed



out and on Oct. 10, 1938, the education committee wrote to the mental deficiency committee saying:

"I am directed to forward herewith copy of the report of Dr. Norman Boycott on Form 306 M with regard to this boy and am to request that the committee under the Mental Deficiency Act will be so good as to consider the advisability of arranging for the boy to be medically examined with a view of his certification . . ."

So it may be that—I am not deciding it—the matter was conceded before the court, but it may be that the decision there could be justified on the basis that that letter coupled with the report was the decision of the local education authority under s. 31, that there was no doubt which would require the matter to be referred to the Board of Education, and that they had ascertained that the child was incapable of deriving any further benefit.

Reference was also made to *Rex v. Postmaster-General. Ex p. Carmichael* (1), where the certificate of the Post Office medical officer certifying that a workman was suffering from telegraphist's cramp was quashed on the ground that the medical officer in question was not the person laid down by the Act. That case was also relied on as being one of a certificate being quashed, but it is to be observed that, although that certificate did not completely conclude the matter, in that the workman who had got the certificate still had to show that his condition resulted from his employment, nevertheless it was final and conclusive on the point that the workman was suffering from cramp, which was the first condition of his obtaining compensation.

In my view, this motion fails on the ground that there is no decision or determination to be quashed, and, accordingly, it is unnecessary for me to consider whether the visiting justices could be said to be under any duty in a case such as this to hear the mother or any representation on her behalf. I agree that this motion fails.

**DONOVAN, J.:** I agree. In particular I agree with the views expressed by the other members of the court for distinguishing this case from *Rex v. Boycott. Ex p. Keasley* (2).

*Motion refused.*

Solicitors: *Harold Miller & Co.* (for the applicant); *Wontner & Sons* (for the visitors); *Solicitor, Ministry of Health* (for the Board of Control).

T.R.F.B.

(1) 91 J.P. 43; [1928] 1 K.B. 291.

(2) [1939] 2 All E.R. 626; [1939] 2 K.B. 651.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 21, 1953

## CHALLAND v. BARTLETT

*Food and Drugs—Milk—Adulteration—“Have in possession for purpose of sale”  
—Milk at defendant's farm—Property in milk already passed to Milk Marketing  
Board—Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950 (14 Geo.  
6, c. 35), s. 9 (1) (c).*

At a court of summary jurisdiction three informations were preferred by the appellant, William Edward Challand, charging the respondent, James Gilbert Bartlett, with having in his possession for the purpose of sale milk to which water had been added, contrary to s. 9 (1) (c) of the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950. The respondent sold his milk to the Milk Marketing Board, who had the right under the contract to direct him where the milk was to be delivered. The board directed the respondent to deliver his milk to a retailer named Wood, and the respondent arranged that Wood should collect the milk from a particular place on the respondent's farm. In the first case Wood had collected the milk from the farm, and was selling it in a street when he was stopped by the sampling officer. In that case the appellant purported to take proceedings under s. 83 (3) of the Food and Drugs Act, 1938, against the respondent as the person to whose act or default the offence was due, but the information charged the respondent with having the milk in his possession. The other two cases related to sales of milk which was at the respondent's farm at the material time. The justices dismissed all three informations, and the appellant appealed.

HELD: (i) that the justices were right in dismissing the first information, as it was bad in form; (ii) that on the two other informations the justices came to a wrong decision, and the case must be remitted with a direction to convict. The Act of 1950, when using the words “have in his possession for the purpose of sale” in s. 9 (1) (c), was drawing a distinction between an article of commerce intended to be sold to another person and an article intended to be kept by the farmer for his personal use, and, although the property in the milk in these cases had passed to the board as soon as it had been appropriated to the contract, the respondent had it “in his possession for the purpose of sale” within the meaning of the subsection at the material time. Even assuming that *Oliver v. Goodger* (1944) (109 J.P. 48) was rightly decided (as to which *quaere*), that case could be distinguished on the ground that there the milk was found to be at a point outside the farm premises.

## CASE STATED by Sussex justices.

At a court of summary jurisdiction sitting at Uckfield on Mar. 5, 1953, the appellant, William Edward Challand, a chief inspector of weights and measures, preferred informations against the respondent, James Gilbert Bartlett, charging (i) under the Food and Drugs Act, 1938, s. 83 (3), that, on Jan. 11, 1953, he did have in his possession for the purpose of sale for human consumption milk to which an addition of water had been made, contrary to the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9 (1) (c), and (ii) by two further informations, that on Jan. 12, 1953, he had in his possession for the purpose of sale for human consumption milk to which an addition of water had been made, contrary to s. 9 (1) (c) of the Act of 1950.

It was proved or admitted that the respondent was the owner and occupier of premises known as Lower Totease Farm, Buxted, where he carried on the business of farming and milk production; that on Sept. 1, 1950, he entered into a contract with the Milk Marketing Board to sell to the board all milk produced at his farm except what he lawfully used in his own household, etc.; that it was provided by cl. 3 of the contract that he should deliver the milk daily to such places and consignees as the board directed, and by cl. 4 (1) that the milk should be ready for collection at the farm collecting point, being, in the absence of other directions, the point at which the milk was usually put

for collection; that the board directed the respondent to supply and deliver milk produced at his farm to one L. A. Wood and that the milk would be collected at the farm; that the dairy at the respondent's farm contained a milk cooler and a bottling machine; that the dairy was used by both Wood, who bottled the milk there, and the respondent; that the milking was done by the respondent in the cowstall, and that the milk was taken to the dairy and placed in the drum of the cooler and thence into churns which were placed in the centre of the floor of the dairy for collection by Wood; that this was agreed between the respondent and Wood as the place of delivery and collection of the milk, and that the respondent, having placed the churns in this position, had completed the delivery of the milk to Wood and had done all that he was required and directed to do by the board; that on Jan. 11, 1953, Wood was seen delivering milk in the village of Buxted about one mile from the respondent's farm; that samples were taken by an inspector who ascertained that the milk had been produced by the respondent; that the following morning the respondent's farm was visited and samples were taken from churns placed in the centre of the dairy floor, the agreed place of collection by Wood, who arrived shortly afterwards and commenced bottling milk from churns from which samples had been taken; that three of the samples contained added water; that samples were also taken of milk which was being produced when the inspector arrived at the dairy and these samples were found to be genuine milk.

On behalf of the respondent it was contended on the authority of *Oliver v. Goodger* (1) (i) that the milk of which samples were taken in the dairy, having been delivered to the agreed collecting point in accordance with the contract and direction of the board, was no longer in the respondent's possession at the time the samples were taken, and (ii) that the milk of which a sample was taken from Wood on his delivery round was also not in the respondent's possession. On behalf of the appellant it was contended that, so far as the milk sample of the delivery round was concerned, s. 83 (3) of the Food and Drugs Act, 1938, applied, and that the milk from which samples were taken in the dairy was in the possession of the respondent since it was still on the respondent's premises and Wood had not yet arrived to take possession of it.

The justices being of opinion (i) that the milk contained added water, (ii) that at the time when the sample was taken on the milk round the milk was not in the possession of the respondent, and (iii) that the milk of which samples were taken in the dairy had passed out of the possession of the respondent when it was placed by him at the agreed point for collection, dismissed the informations. The appellant appealed.

*Paul Wrightson* for the appellant.

*J. H. Gower* for the respondent.

**LORD GODDARD, C.J.:** The first information, in my opinion, was rightly dismissed. The justices found that the respondent had sold his milk to the Milk Marketing Board, and that the board had the right under the contract to direct him where the milk was to be delivered. They directed him to deliver the milk to one Wood, a retail milkman, who, by arrangement with the respondent, used to come to the respondent's farm and collect it from a particular place. One day, after Wood had fetched the milk, he was selling it in the village street, when he was stopped by the appellant, the sampling officer, who took samples. Having ascertained that the milk came from the farm, when it was found to have water added to it the appellant decided to take proceedings under the Food and Drugs Act, 1938, s. 83 (3), which allows

(1) 109 J.P. 48; [1944] 2 All E.R. 481.

the local authority, if they are satisfied that the breach of the Act is due, not to the person who actually sells, but to the person who supplies to the seller, and that the seller can put forward a defence, to proceed against the original supplier, in this case the respondent. The summons issued against the respondent charged him with being in possession of the milk that Wood was selling in the village. Of course, he was not in possession of that milk, the possession having passed to Wood who was selling it, but it was quite right, no doubt, to attempt to take proceedings under s. 83 (3). An information under that sub-section, however, should set out the facts and state that the local authority are reasonably satisfied that the offence of which complaint was made was due to the act or default of the person proceeded against under the sub-section. It may be that this is a technical point because on the merits, or, perhaps, the de-merits, of the case, there is no doubt that the respondent was responsible. But the proceedings under s. 83 (3) must be taken in proper form, and counsel for the appellant concedes, and it is the opinion of the court, that the information was not in the right form and did not give the justices jurisdiction.

With regard to the other two summonses, we think that the case must go back with a direction to convict. Those two cases related to sales of milk which was at the respondent's dairy. It seems to me that until Wood took possession of the milk, it always was and remained in the possession of the respondent. It must have been in the possession of somebody because there is no suggestion that it was abandoned. It was held by the respondent for Wood, and if a trespasser, or somebody representing himself as Wood, or a thief, had come to the farm, the respondent would not have delivered the milk to him, but would have said: "This is Wood's milk. You have to get authority from him". He was keeping possession of it for Wood although it may be that the property in the milk had passed to the Milk Marketing Board. The property was in the Milk Marketing Board till it had been delivered to Wood and it seems to me it was in the possession of the respondent till it had been delivered to Wood.

Before I refer to the cases cited, I would say that the point was made that, as the Food and Drugs (Milk, Dairies and Artificial Cream) Act, 1950, s. 9 (1) (c), refers to "have in his possession for sale", and as the sale was complete in the sense that as soon as the milk was appropriated to the contract the property passed to the Milk Marketing Board, therefore, it was not in the respondent's possession for sale. But that is not, I think, the intention of the Act, which is to draw a distinction between an article of commerce to be sold to other people and an article to be used by the farmer for his own personal use. If he keeps milk on his premises for his own personal use, there is no reason why he should not have milk and water if he prefers that to milk. In my opinion, this expression "possession for the purpose of sale" simply shows that s. 9 (1) (c) is dealing with milk treated as an article of commerce and not with milk kept for the farmer's own use. *Oliver v. Goodger* (1), which was cited to the justices and does seem at first sight to be very like this case, was a case in which a Divisional Court consisting of VISCOUNT CALDECOTE, C.J., HUMPHREYS, J., and BIRKETT, J., decided that no offence had been committed. That case was considered by this court in *Kilsby v. Horsford* (2), which I remember because both OLIVER, J., and myself, and, I think, STABLE, J., the third member of the court, found great difficulty in understanding the decision in *Oliver v. Goodger* (1). Certainly, *Oliver v. Goodger* (1) has not been followed, and I cannot help thinking that, if the effect contended for successfully before the justices should be given to

(1) 109 J.P. 48; [1944] 2 All E.R. 481.

(2) (1949), 93 Sol. Jo. 601.



that decision, it would, to use a common expression, drive a coach and four through this section of the Act. We distinguished *Kilsby v. Horsford* (1) from *Oliver v. Goodger* (2) by showing that the judgment in the latter case could be upheld on the ground that the milk had left the farm premises and had been put on the road outside the farm. Therefore, we said, to use the words of VISCOUNT CALDECOTE, C.J., that on the evidence the justices were entitled to come to the decision which they had reached, and the decision which the justices in that case had reached was that the milk was no longer in the possession of the farmer. I say frankly, though I recognise I am bound by that case, that I feel doubt whether it was right, and I myself should not have decided that way. I said in *Kilsby v. Horsford* (1) (93 Sol. Jo. 601) that the milk was as much in the possession of the respondent farmer as if it had been in the farm dairy or in a barn, because the delivery point in that case was within the curtilage of the farm. That case was not cited to the justices in the present case, and, therefore, they not unnaturally thought they were bound by *Oliver v. Goodger* (2). Therefore, as they did not come to a correct decision with regard to the second and third informations, the appeal must be allowed and those informations must go back to the justices with an intimation that the offences were proved.

PARKER, J.: I agree.

DONOVAN, J.: I agree.

*Appeal partly allowed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *H. S. Martin*, clerk of the county council, Lewes (for the appellant); *Langhams & Letts*, agents for *Dawson & Hart*, Uckfield (for the respondent). T.R.F.B.

(1) (1949), 93 Sol. Jo. 601.

(2) 109 J.P. 48; [1944] 2 All E.R. 481.

### COURT OF APPEAL

(SIR RAYMOND EVERSLED, M.R., BIRKETT AND MORRIS, L.JJ.)

July 23, 1953

PERRINS v. DRAPER

*Rates—Agricultural buildings—“Used solely in connection with agricultural operations thereon”—Dairy—Cooling and pasteurising milk from neighbouring farm—Rating and Valuation (Apportionment) Act, 1928 (18 and 19 Geo. 5, c. 44), s. 2 (2).*

The ratepayer occupied sixty-four acres of agricultural land and his brother occupied a neighbouring farm. On the ratepayer's farm there was a dairy in which milk from both farms was cooled and pasteurised. The question for the decision of the court was whether the dairy was an agricultural building within the meaning of s. 2 (2) of the Rating and Valuation (Apportionment) Act, 1928, which defines agricultural buildings as “buildings (other than dwelling-houses) occupied together with agricultural land . . . and . . . used solely in connection with agricultural operations thereon.”

HELD: the production of milk was an agricultural operation and the building was, therefore, used in connection with an agricultural operation, but, as the operation was not confined to the land occupied with the building, the dairy was not an agricultural building.

*Thompson v. Milk Marketing Board* (1952) (116 J.P. 473) distinguished.

CASE STATED by the Lands Tribunal.

The local valuation court for Dorset determined that the assessment relating to a hereditament comprising an agricultural dwelling-house, dairy, and premises

situate at Stourpaine, in the county of Dorset, be altered from gross value £50 and rateable value £40 to gross value £20 and rateable value £12 on the ground that the dairy was an agricultural building within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), and was not rateable. The valuation officer appealed against that decision to the Lands Tribunal.

It was proved before the tribunal that the hereditament, the subject of the appeal, comprised sixty-four acres of agricultural land together with a dwelling-house and outbuilding and a detached dairy; that the hereditament was formerly part of Havelins Farm which had an area of about three hundred and sixty-four acres, and had been occupied by the ratepayer's father who produced milk thereon which he retailed locally; that, in 1937, Havelins Farm was divided between the ratepayer and his brother, the ratepayer taking over the retail milk business and the sixty-four acres of land, the subject of the appeal; that, in 1950, the ratepayer built a dairy in which he cooled and bottled all the milk sold through his retail business, and pasteurised some of it; that the ratepayer produced about fifty gallons of milk per day on the hereditament in question and also bought from his brother about two hundred gallons per day produced on Havelins Farm, and in times of shortage he purchased milk in bulk from United Dairies, Ltd., to make up his daily delivery; that the dairy building was occupied together with the agricultural land comprising the hereditaments; that the sole use of the building was the cooling, pasteurising and bottling of milk; that the use of the building for milk purchased from sources other than Havelins Farm was occasional only and for brief periods.

For the valuation officer it was contended that on the facts as found the dairy building was rateable in that it was not an agricultural building within the meaning of s. 2 (2) of the Act of 1928, since it was not used solely in connection with agricultural operations on the land occupied therewith, but also, and to a greater extent, in connection with agricultural operations on other land.

For the ratepayer it was contended that the dairy building was not rateable in that it was an agricultural building, since it was occupied together with agricultural land and the use to which it was solely put consisted of agricultural operations thereon, and that such use and operations were not connected with agricultural or any operations on any other hereditament. The parties agreed that, if the valuation officer's contention was correct, the assessment should be gross value £50, rateable value £40, but, if the ratepayer's contention was correct the figure should be £20 and £12 respectively.

The tribunal came to the conclusion that the building was used solely for an agricultural purpose, but that that use was in connection, not only with the associated hereditament, but also, and to a greater extent, with another hereditament altogether, viz., Havelins Farm. In the opinion of the tribunal, the decision rested on the construction of the words "used solely in connection with agricultural operations thereon" in the definition of agricultural buildings in s. 2 (2) of the Act of 1928, and, subject to the *de minimis* rule, these words must be interpreted as meaning on the agricultural land occupied with the building in question and on that land alone. They further concluded that the *de minimis* rule could not apply seeing that some seventy-five per cent. of the milk treated in the building was produced elsewhere than on the agricultural land occupied by the ratepayer. Accordingly, the tribunal allowed the appeal and ordered that the assessment be restored to gross value £50 and rateable value £40. The ratepayer appealed.

*Huntley* for the ratepayer.

*Maurice Lyell* for the valuation officer.

**SIR RAYMOND EVERSLED, M.R.**, stated the facts and continued: The sole question in the appeal is whether this dairy is an "agricultural building" within the meaning of the Rating and Valuation (Apportionment) Act, 1928, s. 2 (2), which provides:

" 'Agricultural buildings' means buildings (other than dwelling-houses) occupied together with agricultural land . . . and . . . used solely in connection with agricultural operations thereon."

It seems to me that so far as is relevant that definition is plain in its terms and meaning. The word "thereon" at the end of the definition must mean the agricultural land together with which the building is occupied, and the only question, therefore, is whether this dairy is being used solely in connection with some agricultural operations on the land with which the building is occupied. It is not, of course, open to doubt that maintaining a herd of dairy cattle is an agricultural operation, and it is, therefore, plain that, if this dairy were used exclusively for cooling, etc., the milk which the ratepayer produced on his sixty-four acres of land, it would be properly described as being used solely in connection with the agricultural operations on that land. In truth and in fact, as it seems to me, this building is used in connection with the agricultural operation of the production of milk, but that operation is not confined to the land occupied with the building: the milk produced is produced only as to about one-fifth on that land and as to the rest on the ratepayer's brother's land. If, therefore, I am right in saying that the production of milk is the "agricultural operation" in question, then, the milk produced not being exclusively produced on the ratepayer's land, it seems to me plainly to follow that the building is not an "agricultural building" within the definition.

It was, however, said by counsel for the ratepayer that the true agricultural operation which is here in question is not that of milk production but the more limited operation of cooling, pasteurising and bottling milk. If that is the agricultural operation, then it seems to me that it is exclusively carried on in the building and not at all on the adjoining land; alternatively, it is an operation connected with milk which is certainly not produced exclusively on the land occupied by the ratepayer. In my judgment, however, the true agricultural operation here in question is that of the production of milk, not that merely of cooling. The case, therefore, seems to me to be distinct from *Thompson v. Milk Marketing Board* (1), and, save for the language of *SOMERVELL, L.J.*, which supports the view I have taken of the meaning of the word "thereon" in the definition, that case does not, I think, assist in the solution of the present one. The question there related to a building which was part of a cattle breeding centre established by the Milk Marketing Board and used for the extraction of semen from bulls for the artificial insemination of cows. The agricultural land together with which the building in question was occupied was limited to some twenty-nine acres, on which the bulls were grazed and otherwise maintained. The semen, having been extracted from the bulls, was used for the purpose of the insemination of cows not brought on or kept on the twenty-nine acres but maintained on other farm lands in no sense occupied with the building in question—occupied, in fact, by farmers all round the neighbourhood. The argument for the valuation officer was that one could not treat the operation which consisted of and ended with the extraction of the semen as being a complete agricultural operation: the total operation was the insemination of the cows and that operation was not carried out on the land in question. This court, however, held that the keeping of these bulls

(1) 116 J.P. 473; [1952] 2 All E.R. 344; [1952] 2 Q.B. 817.

and the extraction of the semen from them was an agricultural operation distinct in itself and that it did not matter that the product of that operation was not something sold in the market but was something which was thereafter used by way of service elsewhere. I have said that I find nothing in that case which can really assist in the problem now presented to us, and, for the reasons which I have given, it seems to me that the conclusion stated by the Lands Tribunal was correct. This appeal fails and must be dismissed.

**BIRKETT, L.J.:** I agree.

**MORRIS, L.J.:** I also agree. I think that the question in this case may be posed as follows: Is the dairy building which is occupied together with sixty-four acres of agricultural land used solely in connection with agricultural operations on that sixty-four acres of agricultural land? In my judgment, the answer to that question must be "No", for the reason that the dairy building is considerably used in connection with agricultural operations on other land—that is to say, on the adjoining three hundred acres.

*Appeal dismissed.*

Solicitors: *Church, Adams, Tatham & Co.*, agents for *Burges, Salmon & Co.*, Bristol (for the ratepayer); *Solicitor of Inland Revenue* (for the valuation officer). F.G.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 23, 24, 1953

REG. v. CHAIRMAN, COUNTY OF LONDON QUARTER SESSIONS.  
*Ex parte* DOWNES

*Criminal Law—Indictment—Quashing—Offence not disclosed on depositions.*

Indictments were preferred at the County of London Sessions following commitments on informations preferred by the applicant, Alec Downes, a higher executive officer of the Ministry of Supply, against the defendants, W. R. Howard & Partners, Ltd., and others, charging them with offences involving the buying and selling of steel, contrary to art. I of the Iron and Steel Prices Order, 1951, and reg. 55AB of the Defence (General) Regulations, 1939. Before the defendants were arraigned their counsel submitted that the indictments should be quashed on the ground, not that they did not disclose any offence known to the law or that the counts were in any way defective, but that the evidence for the prosecution, as disclosed by the depositions, was not sufficient to support a conviction. The chairman, having examined the depositions, was of opinion that there was insufficient evidence that the statutory instruments, the breach of which formed the subject of the indictments, had been duly published or brought to the knowledge of the defendants, and that the prosecution would not be able to obtain a conviction on any of the counts. He, accordingly, quashed the indictments. The applicant obtained leave to apply for an order of mandamus directing the chairman to hear and determine the indictments.

**HELD:** that there was no power in a court to quash an indictment on the ground that the evidence on the depositions would not support the charge; the course taken by the chairman was not warranted by law; and, therefore, an order of mandamus would issue.

**MOTIONS** for certiorari and mandamus.

In January, 1953, indictments were preferred by Alec Downes, a higher executive officer of the Ministry of Supply, at the County of London Quarter Sessions against the respondents charging them with unlawfully selling, on divers dates between June and October, 1951, steel of a class mentioned in the schedule



to the Iron and Steel Prices Order, 1951 (S.I., 1951, No. 252), as amended, at a price which was in excess of the maximum price, contrary to art. 1 of the order, as amended, and to reg. 55AB of the Defence (General) Regulations, 1939. The cases came up for hearing on May 7, 1953, when counsel for the respondents moved, before the arraignment of the respondents, to quash the indictments on the ground that the depositions disclosed insufficient evidence to support a conviction. Notice had been given that additional evidence would be adduced by the prosecution. The chairman, having examined the depositions, quashed the indictments on the ground that, having regard to the decision in *Defiant Cycle Co., Ltd. v. Newell* (1), the prosecution would not be able to obtain a conviction since there was insufficient evidence to show that the schedules to the Iron and Steel Prices Order, 1951, as amended, had been published or brought to the respondents' knowledge. The applicant applied for an order of certiorari to bring up and quash the chairman's order quashing the indictments, and for an order of mandamus directing the chairman to hear and determine the indictments.

*The Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), J.P. Ashworth and Edward Clarke* for the applicant.

*Levy, Q.C., and Faulks* for the respondents, *W. R. Howard & Partners, Ltd., and Helical Bar Engineering Co., Ltd.*

*Sebag Shaw* for the respondent, *P. J. C. Daniels.*

*F. H. Lawton* for the respondents, *J. H. Sully and North London Metals, Ltd.*

*Ruttle* for the respondents, *Harwin Shipping Agency, Ltd.*

*Durand* for the respondent, *R. E. L. Everett.*

The respondent, *Sigmund Rappaport*, appeared in person.

The respondents, *Industrial & International Agencies, Ltd.*, were not represented.

July 24. **LORD GODDARD, C.J.**, read the following judgment. In these cases counsel for the applicant moves for orders of certiorari and mandamus directed to the County of London Quarter Sessions to bring up and quash an order whereby the court purported to quash indictments preferred against the several individuals and companies named therein, and commanding the sessions to hear and determine the indictments according to law.

[His LORDSHIP stated the facts and continued:] The questions that arise are (i) whether the court had any power to act in this manner, and (ii) if not, what steps, if any, this court can take to compel the sessions to try the case. No member of this court has ever known, or heard, of a court quashing an indictment in such circumstances, nor can authority be found to support it. It is said, however, that the court must have power at common law to quash an indictment if satisfied, from a perusal of the depositions, that there must be an acquittal in the end. This seems to ignore entirely the method by which an indictment comes before a court of trial. At common law any person could prefer an indictment to the grand jury and seek a presentment on the information he could give by himself or by witnesses. It was unnecessary to have any depositions at all. Depositions, as at present understood, are entirely the creation of the Indictable Offences Act, 1848, s. 17, though before that Act, no doubt, justices took statements from witnesses in the absence of the accused and also examined him and returned the examinations to the court of trial. A grand jury acted on any evidence they saw fit to admit, and could, and constantly did, act on their own knowledge. The sonorous and stately oath (which, unfortunately, is no longer heard after the opening of the commission at the assizes) was diligently to inquire and true

(1) [1953] 2 All E.R. 38.

presentment make of all such offences, matters and things which were given them in charge or might otherwise come to their knowledge. If anyone takes the trouble to read the old sessions papers published by various individuals from time to time (and very good reading they are), he will find that they are full of cases down to the reign of Queen Victoria of grand juries presenting all manner of things to the court of quarter sessions, which in those days was really the source of local government for the county in such matters as roads which were known to be out of repair, bridges that were in danger, public nuisances, disorderly houses, gaming houses, and the like, all out of their own knowledge. Once a presentment was made, so that the bill became an indictment, the court had to try it unless the alleged offence was unknown to the law, or was imperfectly set out so that it would have been bad on error, or unless matter in bar was alleged by plea, in which case the plea in bar had, and still has, to be tried. Objection to the matter or form of the indictment could be taken by motion to quash, or, less usually, by demurrer. The only question then was whether the indictment was good in substance and form, and not whether the evidence which had been before the grand jury would support it. Indeed, the grand jury's oath obliged them to keep all their proceedings secret: "The King's counsel, your own, and your fellows', you shall well and keep secret." As, however, the liberty of any individual to present a bill was liable to abuse, the Vexatious Indictments Act, 1859, limited the right of the private prosecutor to prefer a bill for certain specified alleged offences.

When grand juries were abolished by the Administration of Justice (Miscellaneous Provisions) Act, 1933, s. 1 (1), committal for trial was substituted for presentment, although provision is made in s. 2 (2) of that Act for enabling any person to prefer a bill by leave of the judge. The signing of the bill by the proper officer of the court is equivalent to presentment, and if the accused has been formally committed for trial the officer must sign it, though, if he is in doubt whether the committal was regular, the matter must be decided by the presiding judge. If he decides it is irregular, no doubt his ruling would have the same effect as the ignoring of a bill by the grand jury. Once an indictment is before the court the accused must be arraigned and tried thereon unless (a) on motion to quash or demurrer pleaded it is held defective in substance or form and not amended; (b) matter in bar is pleaded and the plea is tried or confirmed in favour of the accused; (c) a *nolle prosequi* is entered by the Attorney-General, which cannot be done before the indictment is found; or (d) if the indictment discloses an offence which a particular court has no jurisdiction to try. For example, an indictment at quarter sessions for an offence punishable with imprisonment for life in the first instance.

I know of no power in the court to quash because it is anticipated that the evidence will not support the charge. The only ground on which the court can examine the depositions before arraignment is to see whether, if a count is included for which there has not been a committal, the depositions or examination taken before a justice in the presence of the accused disclosed that offence. Accordingly, the course taken by the sessions in this case was not warranted by law. It amounts to saying that the court has satisfied itself, not on evidence given before the court, but on depositions taken elsewhere, that the accused has a defence. Moreover, if this course were permissible, it would enable a court, the members of which disapproved of, or disliked, a statute the breach of which formed the subject of the indictment, simply to quash it and decline to try it. It is, of course, well known to every practitioner that, if the prosecution is satisfied that there is a good defence to the charge, or that for some reason it is

inadvisable to proceed, it is permissible, with the leave of the court after issue joined, to offer no evidence, when a verdict of acquittal will be directed. Again, if there is more than one indictment against a prisoner it is quite common practice, after the trial of one indictment, to direct that the other indictment or indictments are to remain on the file and not to be prosecuted without leave. I would also add that it often happens (and, indeed, we were told it was so in this case) that the prosecution intend to call evidence in addition to that given before the court of committal. This they are entitled to do, and, though modern practice requires at least, if it involves the calling of additional witnesses, that notice of the fresh evidence should be given, there is no statutory requirement to this effect.

The question then arises what, if anything, this court can do to correct the error into which the sessions have fallen. I feel no doubt that an order of mandamus to hear and determine the indictment can issue. The sessions, in effect, have refused to try the case. No one suggests that the indictments do not disclose an offence, or that they are not good in form, or that the sessions had no jurisdiction to try them. They cannot quash because they are of opinion that the respondents have a defence. They must try the case. This court has on several occasions sent an order of mandamus to quarter sessions where they have declined to proceed. A recent instance is *Reg. v. Norfolk Quarter Sessions. Ex p. Brunson* (1), where the court declined to proceed because some inadmissible evidence had been given before the committing justices, and the court, by order of mandamus, directed the sessions to hear and determine. With regard to certiorari, the question is by no means so clear, and I may refer to a recent learned note by Mr. D. M. GORDON in the *LAW QUARTERLY REVIEW*, vol. 69, p. 175. It seems that when quarter sessions are sitting as a court of oyer and terminer to try prisoners on indictment, certiorari will not lie to bring up a judgment either of acquittal or conviction. The quashing of an indictment is not a judgment of acquittal, nor, a fortiori, of conviction. It is true that in the *Norfolk* case (1), where this point was not taken, this court did order certiorari to issue both for the order quashing the indictment and for the order as to costs. It may be that, had the point been taken, the court would have confined the certiorari to the order for costs, but, in truth, I do not think any certiorari is necessary, so that we need not consider the cases and learning on this subject. The court, by its order of mandamus, will direct the sessions to try the indictments, so it would be eminently futile to take the objection that they have made an order quashing them. It is just because they have made that order that the court directs them to try the case, thus, in effect, directing them to ignore the order they have made. The order of mandamus will go, and the defendants will pay the costs of the application.

PARKER, J.: I entirely agree.

DONOVAN, J.: I agree.

*Order of mandamus.*

Solicitors: *Treasury Solicitor; Capel Cure, Glynn Barton & Co.* (for the respondents, *W. R. Howard & Partners, Ltd.*, and *Helical Bar Engineering Co., Ltd.*); *Lewis Lloyd & Co.* (for the respondent, *P. J. C. Daniels*); *Wontner & Sons* (for the respondents, *J. H. Sully and North London Metals, Ltd.*); *Mellows & Mellows* (for the respondents, *Harwin Shipping Agency, Ltd.*); *Hart-Leverson & Co.* (for the respondent, *R. E. L. Everett*).

T.R.F.B.

(1) [1953] 1 All E.R. 346.

COURT OF APPEAL

(SIR RAYMOND EVERSLED, M.R., BIRKETT AND ROMER, L.J.J.)

June 24, 1953

GREGORY v. FEARN

*Sunday Observance*—"Tradesman or other person"—*Estate agent*—*Contract to effect sale of land on commission entered into on Sunday*—*Validity*—*Sunday Observance Act, 1677 (29 Car. 2, c. 7), s. 1.*

An estate agent is not a "tradesman or other person" within the meaning of the Sunday Observance Act, 1677, s. 1, and, therefore, a contract entered into on a Sunday to employ an estate agent to effect the sale of land in consideration of the payment to him of a commission on the price obtained is not prohibited by that section.

*Palmer v. Snow* (1900) (64 J.P. 342) applied.

APPEAL by the plaintiff from a decision of His Honour JUDGE CAPORN at Nottingham County Court, dated Apr. 24, 1953, dismissing the plaintiff's claim for commission.

The plaintiff was an estate agent, and the defendant was the owner of certain property which he wished to sell. The defendant told the plaintiff that the property to be sold was not available for business purposes, and the sum of £1,000 was fixed as the purchase price. On Sunday, Apr. 20, 1952, the plaintiff and the defendant entered into an agreement whereby the plaintiff undertook to effect the sale of the land and the defendant agreed to pay the plaintiff

"a commission of £100 when sold and the said property shall be deemed to be sold and the commission payable on the receipt of a deposit or on a purchase agreement being entered into by a purchaser."

One Owen, who wished to use the land for business purposes entered into an agreement for the sale of the property, but paid no deposit. The plaintiff claimed against the defendant £100 as his commission due under the agreement of Apr. 20, 1952, but the learned county court judge dismissed the claim on the grounds, inter alia, (i) that the agreement of Apr. 20, 1952, having been made on a Sunday fell within the prohibition of the Sunday Observance Act, 1677, s. 1; and (ii) that Owen was induced by the misrepresentation of the plaintiff to enter into the purchase agreement, and that, therefore, the plaintiff could not rely on such an agreement for the recovery of his commission. The plaintiff appealed.

*T. R. Heald* for the plaintiff.

The defendant did not appear.

**SIR RAYMOND EVERSLED, M.R.:** The first point which is to be noticed is that Apr. 20, 1952, was a Sunday, and the learned judge in the court below concluded against the plaintiff on the ground, among others, that the agreement fell within the prohibition of the Sunday Observance Act, 1677, s. 1, as having involved the doing of business or work in his ordinary calling on the Lord's day by a tradesman, to wit, an estate agent. On the view I take, it is not strictly necessary to decide that point, but it seems to me, as at present advised, that counsel for the plaintiff is right when he says that an estate agent is not a tradesman within the contemplation of that section, even if the execution by him of a contract of this kind was the doing of business or work in his ordinary calling. At first sight, counsel's argument appeared to be difficult, because the formula in the Act is "noe tradesman artificer workman labourer or other person whatsoever", and assuming that an estate agent is not a



tradesman, he would, *prima facie*, be within the formula "other person whatsoever". It has, however, long been established that the words "other person whatsoever" are to be construed *eiusdem generis* with those that precede them, so that for the defendant to succeed on this point, it must be shown that an estate agent is a tradesman or something sufficiently like a tradesman to be covered by the *eiusdem generis* rule. *Palmer v. Snow* (1), which has the added force of being a decision of CHANNELL, J., shows that one who carries on the profession of a barber was not a tradesman, since a barber (so it was there said) does not commonly buy or sell things. If that be the kind of criterion to be applied, it would appear to me to exclude an estate agent from the formula in the Sunday Observance Act, 1677, s. 1, but, as I have said already, it is not strictly necessary to express a concluded view on that matter, since there is another ground on which the learned judge decided against the plaintiff, and against that part of the decision, as it seems to me, counsel for the plaintiff battles in vain.

The form of the contract which was made on this Sunday in April, 1952, was not quite the usual form of an estate agent's contract. For one thing, there was a lump sum commission and not a percentage, and the obligation was expressed thus:

"I agree to pay him a commission of £100 when [the property is] sold and the said property shall be deemed to be sold and the commission payable on the receipt of a deposit or on a purchase agreement being entered into by a purchaser."

There was no deposit in fact received by the plaintiff, and it would, therefore, be necessary, in order that he should succeed, for him to show that a purchase agreement was entered into by a purchaser within the meaning of the contract. It may be (and I will assume that it is, because we have heard no argument about it) open to counsel for the plaintiff to contend that a purchase agreement does not necessarily mean an agreement enforceable in the courts, but counsel concedes that, if the only agreement on which he can rely was one which the purchaser was induced to enter into by the plaintiff's own misrepresentation, even though that misrepresentation was quite innocent, then the plaintiff cannot rely on such an agreement as having earned his commission.

Since an agreement, on the face of it binding, was in fact entered into, there remains only the question of fact: Was the purchaser induced to enter into that agreement by a misrepresentation on the plaintiff's part? [His LORDSHIP considered the evidence and continued:] I feel no doubt that the judge found, and there was evidence to support the finding, that the purchaser was misled by what he had been told by the plaintiff, and he was misled into entering into the contract in the belief that this land would be available to him or would be likely to be made available to him for some of his business purposes, and that, in leading him so to think, the plaintiff misrepresented (albeit quite innocently) the true position. On those facts it follows, first, that the purchaser could not have had this contract enforced against him, and, secondly, as counsel concedes, that the plaintiff cannot rely on such a contract to establish that he had earned his commission. On those grounds, it seems to me that this appeal must fail and be dismissed, and it becomes unnecessary for me to say any more about the possible third problem of the construction of the contract itself.

**BIRKETT, L.J.:** I am of the same opinion. Of the two points which

(1) *Palmer v. Snow*, 64 J.P. 342; [1900] 1 Q.B. 725.

have been raised and argued in this court, so far as the first point is concerned (that under the Sunday Observance Act, 1677), although it is not strictly necessary for a decision of the appeal in view of our decision on the second point, I should like to say that I agree with the observations of my Lord and that an estate agent, in my opinion, could not be a tradesman within the meaning of the statute and its interpretation in the decided cases. I regard the second point as entirely a question of fact which has been rightly decided by the judge and the conclusions of law follow.

**ROMER, L.J.:** I also agree, and I should like to associate myself with the view that an estate agent is not within the purview of the Sunday Observance Act, 1677, s. 1. *Appeal dismissed.*

Solicitors: *Corbin, Greener & Cook*, agents for *Huntsman, Donaldson & Tyzack*, Nottingham (for the plaintiff). F.G.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, J.J.)

July 28, 1953

#### BROWNING v. J. W. H. WATSON (ROCHESTER), LTD.

*Road Traffic—Express carriage—Permitting use without licence—Conveyance of private party on special occasion—Club outing—Two non-members carried—No knowledge by coach proprietors' servants that persons were not members—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), ss. 61, 72.*

On Aug. 30, Sept. 13 and 27, Oct. 18, and Nov. 1 and 15, 1952, a motor-coach was hired from the respondents, coach proprietors, by the secretary of the United Services Club, Rainham, to take members of the club to Gillingham football ground where, on each occasion, the Gillingham football club's first team were playing in a league match. On Nov. 15, 1952, the appellant and a traffic examiner boarded the coach and travelled to Gillingham as passengers. Fares were collected from them by a committee member of the club, but neither the respondents' servants nor any other person knew that they were not members of the club. On informations preferred by the appellant charging the respondents with unlawfully permitting a motor coach to be used as an express carriage without a road service licence, contrary to s. 72 (2) of the Road Traffic Act, 1930,

**HELD:** that with regard to the first five informations, it was open to the justices to find that the occasions were special and to dismiss the informations, but with regard to the sixth, if a coach proprietor let a coach to a club for the conveyance of its members and through his servants not taking adequate precautions allowed non-members to travel in it, he was liable for the acts of his servants, and, therefore, with regard to that occasion, there must be a direction to convict.

**CASE STATED** by city of Rochester justices.

At a court of summary jurisdiction sitting at Rochester on Mar. 27, 1953, the appellant, Ernest Clifford Browning, on behalf of the licensing authority for public service vehicles for the South Eastern Traffic Area, preferred six informations against the respondents, J. W. H. Watson (Rochester), Ltd., charging that on six Saturdays during the period August to November, 1952, they unlawfully permitted a motor vehicle to be used as an express carriage within the meaning of the Road Traffic Acts, 1930 to 1937, on the road between Rainham and Gillingham in Kent, otherwise than under a road service licence granted by the licensing authority, contrary to the Road Traffic Act, 1930, s. 72 (1).

It was proved or admitted that the respondents were coach proprietors and

owners of a double-decked motor coach. On Aug. 30, Sept. 13 and 27, Oct. 18, and Nov. 1 and 15, 1952, the motor coach was hired from the respondents by the secretary of the United Services Club, Rainham, to take members of the club to Gillingham football ground, where, on each occasion, the first team of the Gillingham football club was playing in a Third Division (Southern) League match. On each occasion the hiring was arranged a few days beforehand. On Nov. 15, 1952, the appellant and one Lander, a traffic examiner in the service of the licensing authority, boarded the motor coach when it was standing outside the club premises at Rainham and travelled to Gillingham football ground as passengers, returning by the motor coach after the match. Fares were collected from them and from a few other passengers by a member of the committee of the club. Neither the respondents' servants nor anyone else, save the appellant and Lander, were aware that the motor coach was carrying as passengers anyone who was not a member of the club. Had this fact been known, the coach would have been stopped immediately and the appellant and Lander compelled to leave it. Except on this one occasion, all persons who travelled in the motor coach on those dates were members of the United Services Club. According to the work tickets relating to the journeys, and in fact, each of the journeys was from the United Services Club, Rainham, to Gillingham football ground. On each occasion the respondents complied with the Road Traffic Act, 1934, s. 25 (1) (b) to (g). Section 25 (1) (a) was complied with on all occasions except Nov. 15, 1952, when the appellant and Lander were present in the motor coach. The respondents had no road service licence to use the motor coach as an express carriage on any of the material dates.

It was contended on behalf of the appellant that the journeys were not made on special occasions within the meaning of the Road Traffic Act, 1930, s. 61 (2), and that, as the appellant and Lander had been able to travel as passengers on the motor coach on Nov. 15, 1952, it was not used on that date for the conveyance of a private party. It was contended on behalf of the respondents that a separate hiring of the motor coach was made in respect of each journey to Gillingham, and, accordingly, each occasion should be considered separately. As on each occasion a football match was taking place at Gillingham, each occasion was a special occasion. As the presence of the appellant and Lander in the motor coach on Nov. 15, 1952, was unknown to the respondents, their servants or agents, the respondents had not permitted the motor coach to be used otherwise than for the conveyance of a private party.

The justices dismissed the informations and the appellant appealed.

*Skelhorn* for the appellant.

*Van Oss* for the respondents.

**LORD GODDARD, C.J.:** This is a Case stated by justices for the city of Rochester before whom the respondent company was charged on six informations with allowing a vehicle, alleged to be in the category of "express carriage", to be used without the appropriate licence for the conveyance of persons, contrary to the Road Traffic Act, 1930, s. 72 (1). The answer made by the respondents was that the persons in the vehicle were being conveyed as private parties on special occasions. This raises the sometimes difficult questions which come before this court, both on the meaning of "special occasion" and on the meaning of "private party". [His LORDSHIP stated the facts and continued:] The appeal is brought to test whether the justices were right in holding that the occasions were special occasions, and it is sought to say that, because there were six football matches, they could not be special occasions.

The proviso to s. 61 (1) of the Road Traffic Act, 1930, provides:

" . . . a motor vehicle adapted to carry less than eight passengers shall not be deemed to be a stage carriage or an express carriage by reason only that on occasions of race meetings, public gatherings and other like special occasions it is used to carry passengers at separate fares."

By s. 61 (2):

" It is hereby declared that where persons are carried in a motor vehicle for any journey in consideration of separate payments made by them, whether to the owner of the vehicle or to any other person, the vehicle in which they are carried shall be deemed to be a vehicle carrying passengers for hire or reward at separate fares, whether the payments are solely in respect of the journey or not. Provided that a vehicle used on a special occasion for the conveyance of a private party shall not be deemed to be a vehicle carrying passengers for hire or reward at separate fares by reason only that the members of the party have made separate payments which cover their conveyance by that vehicle on that occasion."

Obviously the proviso to sub-s. (1) does not, in terms, apply to this case, because the vehicle in question was adapted to carry more than eight passengers. The cases which have dealt with this matter start with *Nelson v. Blackford* (1), where this court, in giving judgment, said:

" A special occasion must be a particular and individual occasion analogous to a race meeting."

That was a case under s. 61 (1) and in the proviso to that sub-section " special occasions " is part of the phrase " race meetings, public gatherings and other like special occasions ". If the expression " special occasions " is used twice in the same section it bears the same meaning. Therefore, the court has said, practically in so many words, that, in construing the proviso to sub-s. (2), one must apply the ejusdem generis rule and consider whether the occasion is something in the nature of a race meeting or public gathering—an occasion for which it is contemplated that extra transport will be required to satisfy the public who want to go to these places. The justices have found that these football matches were special occasions, and the question is whether they were right in view of the fact that there were six matches all taking place within a comparatively short space of time. It should be observed that there were no more than two in one month. We are not, therefore, dealing with a case like *Nelson v. Blackford* (1), where illuminations went on for seven weeks at Blackpool and this court said that there cannot be a special occasion where things go on for such a period. Here you have football matches of a special nature, in the sense that they are not just ordinary club matches, but are league matches, and occurring not more than twice a month. Could the justices on those facts, properly find that they were special occasions? In my opinion, clearly they could.

Reliance is placed on *Miller v. Pill*, *Pill v. Furse*, *Pill v. J. Mutton & Son* (2), which had to be considered by this court in *Wurzal v. Dowker* (3) because of a dictum of my own in *Victoria Motors (Scarborough), Ltd. v. Wurzal* (4), for which, I hope, in *Wurzal v. Dowker* (3) I stood sufficiently in a white sheet and with a candle in my hand because the attention of the court

(1) [1936] 2 All E.R. 109.

(2) 97 J.P. 197; [1933] 2 K.B. 308.

(3) 117 J.P. 336; [1953] 2 All E.R. 88.

(4) 115 J.P. 333; [1951] 1 All E.R. 1016; [1951] 2 K.B. 520.



had not been called, in the *Victoria Motors* case (1), to *Miller v. Pill* (2). I still think the view we held was preferable to the view held in *Miller v. Pill* (2), but we are bound by the latter case. In *Miller v. Pill* (2) HUMPHREYS, J., said, rather summarising what the other members of the court had said:

"... I should come to the conclusion that the expression 'special occasion' refers to something more than the views and intentions of the members of the party and points to something which can be described as a special occasion in the locality and was the object of the journey being undertaken."

A football match is frequently a special occasion in the locality. I cannot see, for this purpose, the difference between a football match and a race meeting. The Act has not provided, in enacting that race meetings are special occasions, that they must be meetings which only take place two or three times a year or at certain specified intervals. Therefore, I think, when there is a football match and a club is playing a different club each time—and there is no pretence here of saying that this was being used simply to provide what I may call an unauthorised omnibus service; it was a trip provided for the members of a particular club to attend the particular occasion which the justices were, in my opinion, justified in holding was special to the locality—that the requirements of the decision of *Miller v. Pill* (2) and all the doubts which may have existed since then are amply satisfied by the facts of this case. Therefore, I think that, with regard to five of these informations; there was evidence on which the justices could find, and were justified in finding, that the occasions of the journeys were special.

With regard to the next point, on one of these occasions two persons in the employ of the Minister of Transport insinuated themselves among the members of the club and got into the coach, and, therefore, as they were not members of the club for whom the coach had been hired, but were outsiders, they prevented the party from being a private party. The justices thought that the respondents could not be convicted because they did not know of the presence of these two people among the members of the party in the coach. Reliance has been placed on *Reynolds v. G. H. Austin & Sons, Ltd.* (3), in which this court, in a reserved judgment, went very fully into the question of vicarious liability in these cases, but it should be observed that the facts in that case were of a somewhat special nature. A women's institute had engaged a coach to take them on an outing, and, as they had not sold enough tickets in the township where the institute was, they put an advertisement in the window of a shop some miles away, and, therefore, there had been a previous advertisement to the public of the arrangements for the party. We pointed out that the advertisement was an advertisement by the promoter and the trip was advertised a long distance away. There were no practical means by which the proprietors of the coach could know of the advertisement, and they had no reason to suppose that the trip had been advertised. Accordingly, reviewing the cases over a long period, we came to the conclusion that the proprietors were not vicariously liable by reason of the fact that the persons who engaged them had committed a breach of the Act. But I think it is implicit throughout the judgments that we were excluding a case where a man or a company might incur vicarious liability because of the conduct of their servants. Here, the coach was in charge of the respondents' servant, and, although he did not know

(1) 115 J.P. 333; [1951] 1 All E.R. 1016; [1951] 2 K.B. 520.

(2) 97 J.P. 197; [1933] 2 K.B. 308.

(3) 115 J.P. 192; [1951] 1 All E.R. 606; [1951] 2 K.B. 135.

that persons who were not members of the club got in the coach, that was because he did not inquire or take any precaution to see that only members were admitted, and we cannot absolve the respondents on that ground. The prohibitions in the Act are absolute, and, while it is true that in *Reynolds v. G. H. Austin & Sons, Ltd.* (1) we refused to impose vicarious liability and a good deal of discussion took place about the doctrine of mens rea, in cases of absolute prohibition mens rea can be supplied by the simple doing of the forbidden act. We cannot say here that, if a coach proprietor lets a coach to a club for the conveyance of the members of the club and allows people who are not members of the club to get into the coach, he is not liable. Of course, this was not a wilful violation, but it is clear that the respondents should have taken some precaution. They should have told the football club: "We will only do this if either you issue tickets to the members so that we can see that the people who get on the coach are members, or one of your servants, or the secretary of the club, or some other person, stands at the starting place to see that only members of the party get on to the coach." But I think that it would be going too far to say that, if the members of the public, other than members of the party, get on to the coach and are conveyed, it is an answer to say: "We did not know that that had happened". At the same time, the justices are entitled to take all the facts into consideration. No court in England has ever liked action by what are generally called agents provocateurs resulting in imposing criminal liability. We must, therefore, hold that, in the case of the sixth information—i.e., the information relating to Nov. 15, 1952—there was an offence, but we remind the magistrates that it is possible for them to grant an absolute discharge and it is not necessary for them when they do grant an absolute discharge to order payment of costs. The case must go back to the magistrates with a direction that this offence is proved, and they can deal with it as they like.

**PARKER, J.:** I agree. I would only add that, on the facts found by the magistrates, it is impossible to say that they were wrong in holding that the six occasions in question were not special occasions. Speaking for myself, I should like to reserve the question whether, if in any particular case the facts showed that the occasions in question were more frequent, the time might come when those occasions ceased to be special occasions by reason of their frequency.

**DONOVAN, J.:** I agree, and I also agree with LORD GODDARD, C.J., that in determining what is a special occasion one must return in the end to the words in the proviso to s. 61 (1), namely: "race meetings, public gatherings and other like special occasions". These last words are to be construed to include "occasions" ejusdem generis with race meetings and public gatherings. I find it difficult to conceive of a genus which will include race meetings and public gatherings and yet exclude a football match, such as the present, an English league match probably attracting thousands of spectators. On the other aspect of the case I have no further observations to make.

*Appeal allowed in part.*

Solicitors: *Treasury Solicitor* (for the appellant); *Gregory, Rowcliffe & Co.*, agents for *Wood, McLellan & Williams*, Chatham (for the respondents).

T.R.F.B.

(1) 115 J.P. 192; [1951] 1 All E.R. 606; [1951] 2 K.B. 135.

COURT OF APPEAL

(SINGLETON, DENNING AND MORRIS, L.JJ.)

July 2, 3, 6, 27, 1953

LITTLEWOOD v. GEORGE WIMPEY & CO., LTD. BRITISH OVERSEAS  
AIRWAYS CORPORATION (second defendants and third parties).

*Public Authority—Limitation of action—Claim for contribution by joint tortfeasor—Commencement of period of limitation—Length of period—Law Reform (Married Women and Tortfeasors) Act, 1935 (25 & 26 Geo. 5, c. 30), s. 6 (1) (c)—Limitation Act, 1939 (2 & 3 Geo. 6, c. 21), s. 2 (1), s. 21 (1)—R.S.C., Ord. 16A, r. 1.*

One year and nine months after an accident in which he was injured a plaintiff issued a writ in an action for damages for negligence and breach of statutory duty against the first defendants. Within three months the first defendants brought in as third parties the public corporation which had employed the plaintiff, and subsequently the plaintiff by leave amended his writ by adding the third parties as defendants. At the trial, both the first defendants and the third parties were found to have been guilty of negligence or breach of duty giving rise to the injury, blame being attributed to them in the proportions of two-thirds and one-third respectively, but the plaintiff's action against the third parties was dismissed on the ground that it was brought against a public authority and had not been commenced within one year of the accrual of the cause of action as required by the Limitation Act, 1939, s. 21 (1). The first defendants claimed contribution towards the damages from the third parties under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c).

HELD: (i) (DENNING, L.J., dissentiente) a "tortfeasor who is, or would if sued have been, liable in respect of the . . . damage," against whom contribution could be claimed under s. 6 (1) (c) of the Act of 1935 meant either (a) one who had been sued and held liable for the damage, or (b) one who had not been sued, but would have been held liable if he had been sued; "sued" could not be construed as "sued in time" (dictum of BIRKETT, J., in *Merlihan v. Pope (A. C.), Ltd. (Pagnello, Third Party)* ([1945] 109 J.P. 231), approved); and, as the third parties had been sued and held not liable for the damage, they were not liable for contribution under the section.

(ii) the time limit under the Limitation Act, 1939, s. 21 (1), for the recovery of contribution commenced to run from the date on which the first defendants' liability was ascertained, i.e., when judgment was given against them, the provisions of R.S.C., Ord. 16A, which provided for the bringing in of the third parties, being machinery for the convenient determination of the position contingently on the first defendants being held liable.

*Wolmerhausen v. Gullick* ([1893] 2 Ch. 514); dictum of CASSELS, J., in *Hordern-Richmond, Ltd. v. Duncan* ([1947] 1 All E.R. 430); and *Morgan v. Ashmore, Benson, Pease & Co., Ltd.* ([1953] 1 All E.R. 328), approved.

*Merlihan v. Pope (A. C.), Ltd. (Pagnello, third party)* (109 J.P. 231), overruled. (iii) (SINGLETON, L.J., dissentiente) liability for contribution arose under the Act of 1935 and not "in respect of any neglect or default in the execution of any . . . Act, duty or authority" under the Limitation Act, 1939, s. 21 (1), and, therefore, the time within which an action for contribution could be brought was six years under s. 2 (1) of the Act of 1939 and not one year under s. 21 (1).

*Tuckwood v. Rotherham Corp'n.* (1921) (85 J.P. 101), applied.

*Decision of PARKER, J.* ([1953] 1 All E.R. 583), affirmed.

APPEAL against an order of PARKER, J., dated Jan. 29, 1953.

Following an accident in which he was injured on July 28, 1949, the plaintiff, on Apr. 26, 1951, issued a writ in an action for damages for negligence and/or breach of statutory duty against the first defendants, who, on July 6, 1951, issued a third-party notice which was served on the third parties, the plaintiff's employers, on July 12, 1951. On Feb. 4, 1952, the plaintiff by leave amended his writ and statement of claim in the action by adding the third parties as second defendants. On Jan. 29, 1953, PARKER, J., gave judgment on the question

of liability in the action, holding that the first defendants were liable to the plaintiff for negligence and that the third parties had been in breach of their statutory duty to provide the plaintiff with a safe system of work, and apportioning the blame for the damage as to two-thirds to the first defendants and as to one-third to the third parties. He held, however, that the third parties were a public authority within the protection of the Public Authorities Protection Act, 1893, and that, as the action had not been commenced within one year from the date on which the cause of action accrued, as required by the Limitation Act, 1939, s. 21 (1), it was statute-barred, and he dismissed the action against them. He further held that the first defendants were not entitled to contribution from the third parties towards their liability for the plaintiff's damages under the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). The first defendants appealed against the order refusing an order for contribution by the third parties.

*Diplock, Q.C., and S. Rees* for the first defendants.

*Scarman* for the second defendants and third parties.

*Cur. adv. vult.*

July 27. The following judgments were read.

**SINGLETON, L.J.:** On July 28, 1949, the plaintiff was employed by the third parties. He was working on a vehicle known as a fork lift when a lorry belonging to the first defendants came into collision with it. On Apr. 26, 1951, he commenced proceedings against the first defendants claiming damages for personal injuries which he alleged were due to the negligence of their driver. On June 20, 1951, the first defendants delivered their defence, which denied negligence and alleged that the accident was due to the negligence of a servant of the third parties. On July 6, 1951, the first defendants issued a third-party notice against the third parties claiming contribution or indemnity. On Nov. 12, 1951, the first defendants delivered their statement of claim against the third parties, and the third parties delivered their defence thereto on Nov. 28, 1951. On Feb. 4, 1952, the plaintiff, pursuant to leave, amended his writ and statement of claim by adding the third parties as defendants in the action. Both in the third-party proceedings and in their defence to the statement of claim, as amended, the third parties pleaded the Limitation Act, 1939, s. 21 (1), as one of their defences. It was said that at the time of the collision their servants were acting in intended execution of the Civil Aviation Act, 1946. **PARKER, J.**, held that this was so, and it is not now in dispute.

The action came on for hearing in January, 1953, and the judgment of **PARKER, J.**, which was given on Jan. 29, 1953, was in favour of the plaintiff against the first defendants. The judge held that the Limitation Act, 1939, s. 21 (1), provided a defence to the claim against the third parties, and that the action failed as against them. Thereupon he had to consider the claim of the first defendants against the third parties for contribution. On that claim the judge held that the first defendants were not entitled to an order for contribution against the third parties, though, but for the defence under s. 21 (1), he would have given judgment against them in the action, and in the third-party proceedings would have ordered them to contribute one-third of the damages. The first defendants appeal to this court on this last part of the judgment, and it is submitted that the third parties ought to be ordered to make contribution.

The right to contribution in the circumstances of this case depends on the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) which reads:

"Where damage is suffered by any person as a result of a tort . . .



(c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought."

The machinery by which the right can be enforced is provided by R.S.C., Ord. 16A. The decision of PARKER, J., on the claim to contribution was based entirely on the wording of s. 6 (1) (c). He held that the claim to contribution failed on the ground that it had not been shown that the third parties were a tortfeasor who either "is liable, or would have been liable if sued". It is said on behalf of the first defendants that the finding of the judge that the responsibility for the collision was to the extent of one-third on the third parties is sufficient to entitle the first defendants to an order for contribution, and that their cause of action against the third parties only arose on judgment against them in the action. If it were otherwise, it was argued, the rights of the defendants against the third party could be defeated by the plaintiff.

I repeat that which I have already said—the position is to be determined by s. 6 (1) (c) of the Act of 1935. It appears to me that the draftsman of the sub-section had in mind a suit in which there were one or more defendants, and it was sought to provide that, after judgment in the action, contribution could be ordered as between the defendants, and, further, that a tortfeasor who had not been sued in the action, but who was brought in as third party, might be ordered to make contribution if he would have been liable in respect of the same damage had he been sued. In that way, the natural meaning of the word "liable" in the first line of the sub-section is "held liable", and the words "who is . . . liable" two lines later would have the same meaning. I am prepared to assume that the meaning of "liable" ought not to be limited to "held liable", and that if a tortfeasor paid a claim he might have a right to contribution. In such a case he would have to prove: (a) that he was a tortfeasor; and (b) that he was liable at the time he paid. And it would be open to the one against whom contribution was claimed to raise any defence which was open to the one who claimed contribution.

The action by the plaintiff was not commenced until twenty-one months after the commission of the tort. At that time an action against the third parties could not have succeeded if s. 21 (1) of the Limitation Act, 1939, was pleaded. They were not held to be liable in the action in which they were subsequently added as defendants. Counsel for the first defendants sought to establish that they were in the position of a tortfeasor who would, if sued, have been liable in respect of the same damage. Now, I find difficulty in treating a tortfeasor who has been sued as though he had not been sued. And I find still greater difficulty in treating such a tortfeasor as one who would have been liable if he had been sued when he is sued in the action and is held not to be liable. I cannot see how a judge who has held that a defendant is not liable can immediately thereafter say that he would have been liable if he had been sued. The claim of the first defendants can only succeed if one is to read into the sub-section after the word "sued" some such words as "in time" or "before any period of limitation had run". There may be omissions in the sub-section. It may not have provided for every eventuality. But it is not legitimate to introduce words into the sub-section. A reasonable interpretation can be given to it as it stands, though it does not go as far as it might have done. The claim does not fall within either limb of the sub-section. The duty of the court

is to apply the sub-section as it stands, not to extend it. I agree with the judgment of PARKER, J.

That is all that it is necessary to say for the determination of this appeal, but as much time was devoted to argument on the Limitation Act, 1939, s. 21 (1), perhaps I ought to say something on it. One question which was raised is as to the time at which the cause of action of a defendant against a third party arises. In *Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party)* (1), a case rather like this, BIRKETT, J., held that the cause of action accrued on the commission of the tort. It is right to say that authorities were not cited to him. In a later case, *Hordern-Richmond, Ltd. v. Duncan* (2), CASSELS, J., took a different view, with which PARKER, J., agreed in the judgment now under appeal. The adoption of the view of BIRKETT, J., would lead to simplification, for there seems to be something incongruous in the position of two defendants who are sued in respect of an accident when one puts (or both put) forward a claim to contribution and it can be said that the cause of action of the plaintiff arises on the date of the accident and the cause of action as to contribution arises on a later date (or dates). None the less, it is difficult to see what cause of action a person who is indirectly involved in an accident has if he has suffered no damage. If he is sued he can make use of the third-party procedure. It may be that his cause of action accrues when the writ in the action is served on him—but that was not argued—and I am content to adopt the view of PARKER, J., that the cause of action arises when the defendant is held liable, i.e., when judgment is given against him, and that R.S.C., Ord. 16A, is merely machinery for the convenient determination of the position which may arise subsequently. This is in accordance with the decision in *Wolmerhausen v. Gullick* (3); see [1893] 2 Ch. 529; and in the ordinary case it avoids the possibility of any injustice to a defendant as against a third party. The form of order in use in contribution cases where both are defendants provides that, on one defendant paying the whole, he shall be at liberty to enter judgment against the other for the proportion of damages and costs found against him.

Counsel for the first defendants submitted that a claim to contribution did not fall under, and was not affected by, s. 21 (1) of the Limitation Act, 1939. He cited in support the decision of the Court of Appeal in *Tuckwood v. Rotherham Corpn.* (4). The claim in that case arose under the Workmen's Compensation Act, 1906, s. 6 (2), and it was held that the Public Authorities Protection Act, 1893, s. 1 (a), did not apply to such a claim. It had been held in an earlier case (*Fry v. Cheltenham Corpn.* (5)) that the Public Authorities Protection Act, 1893, did not apply to a claim by a workman under the Workmen's Compensation Act, 1906, and SCRUTTON, L.J., said:

"In the first place there is the decision of the Court of Appeal in *Fry v. Cheltenham Corpn.* (5) that to a claim by a workman employed by the corporation against the corporation for compensation under the Workmen's Compensation Act, 1906, the Public Authorities Protection Act, 1893, does not apply. I take the ground of the decision to be that the Act of 1893 deals with claims based on acts or neglects, and that the liability under the Workmen's Compensation Act is not based on acts or neglects, but on the statutory consequences of a contract to employ. It seems to me, and this is my first ground, that, if one starts with the

(1) 109 J.P. 231; [1945] 2 All E.R. 449; [1946] K.B. 166.

(2) [1947] 1 All E.R. 427; [1947] K.B. 545.

(3) [1893] 2 Ch. 514.

(4) 85 J.P. 101; [1921] 1 K.B. 526.

(5) (1911), 76 J.P. 89.

proposition that claims by workmen under the Workmen's Compensation Act are not within the Public Authorities Protection Act, the subsidiary claim against public authorities for indemnity against the workmen's claims must also be outside the Public Authorities Protection Act. If it were necessary to strengthen my view, it has been decided by BRAY, J., in *Smith's Dock Co. v. John Readhead & Sons* (1) that the claims on which an employer can recover an indemnity are not limited to claims which can be made by the workman's dependant at common law. In that case the defendants had been guilty of negligence, causing injury to a workman in consequence of which he died shortly afterwards. His illegitimate daughter obtained compensation under the Workmen's Compensation Act from the employer, and indemnity was obtained against the defendants in respect of the compensation so paid to the illegitimate daughter, though the daughter could not have claimed damages against the defendants, because under Lord Campbell's Act such an action could not have been brought on behalf of an illegitimate child. That appears to me to strengthen my view that this action under the Workmen's Compensation Act is outside the provisions of the Public Authorities Protection Act. Secondly, and in some respects this is very like the first ground, I think, looking at the words of the Public Authorities Protection Act, that the claim against the corporation is not for an act done in execution of an Act of Parliament or of a public duty or authority, or in respect of a neglect in the execution of any such Act, duty, or authority. It is true that negligence is one of the ingredients of the liability to indemnify, but there are several other ingredients of the liability—namely, that the person asking for indemnity has, under the Workmen's Compensation Act, either paid or been compelled by an order to pay the compensation provided by the Act, which may be something quite different from the damages which would follow at common law for an act of negligence. In my view on that ground also, which I gather is the view adopted by my Lord, the case does not come within the words of the Act."

I do not regard the decision in that case as helpful in forming a view on the question now under consideration. The right to contribution between tortfeasors is given by s. 6 (1) (c) of the Act of 1935. The procedure applicable is set forth in R.S.C., Ord. 16A—see particularly r. 1, r. 3 and r. 12. That order followed the provisions of the Supreme Court of Judicature (Consolidation) Act, 1925, s. 39 (1) (b), which gave power to the court or a judge to grant

"all such relief relating to or connected with the original subject of the cause or matter, claimed in like manner against any other person, whether already a party to the cause or matter or not, who has been duly served with notice in writing of the claim pursuant to rules of court or any order of the court, as might properly have been granted against that person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose."

Section 39 (2) provides:

"Every person served with any such notice as aforesaid shall thenceforth be deemed a party to the cause or matter with the same rights in respect of his defence against the claim as if he had been duly sued in the ordinary way by the defendant."

Under Ord. 16A, r. 3, the third party becomes a party to the action with

(1) [1912] 2 K.B. 323,

the same rights in respect of his defence against any claim made against him, and otherwise, as if he had been sued by the defendant. From this it follows that a defence under the Limitation Act, 1939, s. 21 (1), is available to a third party. And I would add that s. 31 (1) of that Act provides: "'Action' includes any proceeding in a court of law . . ." I am in favour of dismissing the appeal.

**DENNING, L.J.:** It must seem strange to a private individual that the big contracting firm of George Wimpey & Co., Ltd., the first defendants, can be sued at any time within six years after an accident, whereas the government-controlled British Overseas Airways Corporation, the third parties, can only be sued within one year. This distinction arises because the British Overseas Airways Corporation are a public authority and George Wimpey & Co., Ltd., are not. In June, 1949, a strong committee presided over by LORD TUCKER recommended that there should be no such distinction. It was manifest, they said, that injustice often results to the individual from the one-year limitation for public authorities, and they observed significantly that it is only those who benefit from the one-year limitation who consider that it should continue. Yet nothing has been done to carry out the recommendations of the committee, and more than four years have now elapsed since they made their report. It reminds me of the case we had a little while ago about the hall-marking of gold articles when seventy-three years ago a committee recommended that the law should be consolidated and amended without delay, and yet nothing has so far been done [see *Westwood v. Cann*].

In the present case, it is not the injured man who suffers by the distinction. It is the first defendants. Both the third parties and the first defendants were to blame for the accident. The first defendants have been made to pay the full damages to the injured man, and now, when they claim contribution from the third parties, it is said they cannot get it because the injured man did not sue within one year. He did not sue either of them within one year. Nearly two years elapsed before he started an action at all. I do not suppose that he would have sued the third parties even then but for the fact that he was advised (wrongly as it turns out) that they were not a public authority. Acting on that erroneous advice he sued them. He succeeded in showing that they were to blame, but he did not get judgment against them, because they were protected by the one-year limitation. On this account it is said that the first defendants have no right of contribution from the third parties. It was conceded on behalf of the third parties that, if the injured man had not sued the third parties at all, the first defendants could have got contribution. But it is said, as he sued them and failed, the first defendants cannot get contribution. If such be the law, I can only say it is most unsatisfactory. It means that the right of the first defendants to contribution is defeated by something over which they had no control and with which they had nothing to do. It is defeated by the conduct of the injured man, first, in delaying to sue the third parties for more than a year, and, secondly, in thinking that the third parties were not a public authority and not protected by the one-year limitation.

In order to see whether this is indeed the law, it is necessary to construe the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c), which gives the right to contribution. The critical question is: What is the meaning of the word "liable"? There are two rival views. One is that "liable" means "held liable". According to this view a person is not liable for the damage unless and until he has had judgment entered against him. The other view is that "liable" means "responsible in law". According to this view, a person may be liable for the damage even though he has not been sued to judgment,



In my opinion, the ordinary meaning of the word "liable" in a legal context is to denote the fact that a person is responsible at law. Thus, when it is said (as LORD CHELMSFORD, L.C., once said (3 Macq. 306) in a leading case, *Bartons-hill Coal Co. v. McGuire* (1)) that a master is liable for the wrongdoing of his servant, that means that he is responsible for it in a court of law. It does not mean that he has actually been sued for it. Furthermore, a man may be "liable" in this sense even though the remedy against him is suspended or barred for some reason or other. The law of England is familiar with the concept of a liability which exists in the eye of the law, though it may not be enforceable by action. It is, perhaps, more familiar in contract than in tort. Everyone knows that a contract is good even though it may not be enforceable owing to the Statute of Frauds, and that a debt which is statute-barred is still a debt even though the debtor may, if sued, raise the statute of limitations. The same concept applies also in tort. Thus a thief is liable for his tort of conversion (which is also a felony) though he cannot be sued for it until he has been prosecuted: *Smith v. Selwyn* (2). A diplomat is liable for a tort committed by him, although it is not enforceable against him if he claims diplomatic privilege: *Dickinson v. Del Solar* (3). An injured party who has incurred hospital expenses which have not been paid and have become statute-barred can recover them from a tortfeasor: *Allen v. Waters & Co.* (4), per GODDARD, J. A husband who has been guilty of a tort on his wife is liable in respect of it, though it is enforceable only against his master, not against the husband himself: see *Broom v. Morgan* (5). In the present case, the judge has found in favour of the plaintiff against the first defendants on the issue of liability, but in their favour on the statute of limitations.

If the word "liable" in s. 6 (1) (c) is construed in the sense I have mentioned, which I venture to think is its ordinary meaning, no injustice will result at all, whereas if it is construed as meaning "held liable by judgment" much injustice will result. Let me give some illustrations. (i) If "liable" means "held liable", it would follow that no tortfeasor could claim contribution unless he had been sued to judgment in the courts. That would be a most unreasonable interpretation. As a matter of good sense it ought to be open to a tortfeasor to admit his liability and pay for the damage and then claim contribution from any other tortfeasor. It should not be necessary for the first tortfeasor to contest the claim in the courts before he can recover contribution. That would be so obviously a waste of time and money that Parliament cannot have intended it. When he comes to enforce his right of contribution, however, it must be open to the second tortfeasor to say: "You need not have paid, because you were not liable at all." The court then inquires into his liability in this sense, that it sees whether the first tortfeasor was "responsible at law" for the damage. If it finds him to be so, and also the second tortfeasor, it awards him contribution. This was assumed to be the law in *Knapp v. Railway Executive* (6), and I have no doubt it is correct: see *Page v. Burtwell* (7), per FARWELL, L.J. ([1908] 2 K.B. 763).

(ii) If "liable" means "held liable", it would put it in the power of the injured party to decide whether one tortfeasor should get contribution from

(1) (1858), 3 Macq. 300.

(2) [1914] 3 K.B. 98.

(3) [1930] 1 K.B. 376.

(4) 99 J.P. 41; [1935] 1 K.B. 200.

(5) [1953] 1 All E.R. 849; [1953] 1 Q.B. 597.

(6) [1949] 2 All E.R. 508.

(7) [1908] 2 K.B. 758.

another or not. If the injured party wished to help one of two tortfeasors, all he would have to do would be to execute a deed releasing him, or simply allow the period of limitation to run against him, whereupon it would be clear that that tortfeasor, "if sued", would not be "held liable". Nay more, the injured party could bring a hopeless action against that tortfeasor and allow judgment to be entered for him on the ground of a release or the statute of limitations, whereupon that tortfeasor could say that he had in fact been sued, and had not been "held liable". The same result may be reached without any design on the part of the injured party, but simply by delay, as here, on his part or by an error in point of law. It is impossible to suppose that Parliament contemplated that the right to contribution should depend on such chances. Surely the sensible interpretation is that, if the first tortfeasor brings an action for contribution, the second tortfeasor should be able to resist it on the ground that he was not "liable", i.e., not responsible in law for the damage. But he should not be able to resist it on the ground that, although liable, he escaped for some special reason rendering his liability unenforceable, such as a release, or the statute of limitations.

(iii) When a wife is injured by the negligence of her husband and also the negligence of a stranger (as often happens, I fear, in a motor accident), the wife is entitled to sue the stranger for the whole damage she has suffered, but she cannot sue her husband, because one spouse cannot sue the other for a tort. In point of law, the husband is guilty of a tort, but his wife cannot sue him for it: see *Broom v. Morgan* (1). Suppose now that the wife makes the stranger pay the whole damages, can the stranger recover contribution from the husband on the ground that the husband was also to blame? One would have thought that in justice he ought to be able to do so, but in law it depends on the meaning of the word "liable" in s. 6 (1) (c). If "liable" means what I think it does, "responsible at law", the stranger can recover contribution from the husband, as he ought to do. But if it means "held liable" he cannot. I am aware that in two cases it has been assumed that "liable" means "held liable", and the husband has escaped paying any contribution: see *Chant v. Read* (2) and *Drinkwater v. Kimber* (3); but the point about the meaning of the word "liable" was not argued, and it is, therefore, I suggest, open to re-consideration.

Furthermore, if the word "liable" in the opening words of s. 6 (1) (c) means "responsible at law" (as was assumed in *Knapp v. Railway Executive* (4)), then it should be given the same meaning in the succeeding words. It is a well-settled rule of construction that the same word occurring in the same document should, *prima facie*, be given the same meaning whenever it occurs; all the more so in the same sentence. The only argument against this interpretation of the word "liable" is the words "if sued". The insertion of those words makes it look as if the legislature used the word "liable" in the sense of "held liable". I think that this is too narrow a view. The legislature clearly intended to be comprehensive. They intended to cover any other tortfeasor, whether sued or not, who was responsible in law for the damage. It would be a strange thing if these words, which were intended to have a comprehensive effect, should be interpreted so as to narrow the right to contribution and to make it dependent on the action or inaction of the injured party. These

(1) [1953] 1 All E.R. 849; [1953] 1 Q.B. 597.

(2) [1939] 2 All E.R. 286; [1939] 2 K.B. 346.

(3) [1952] 1 All E.R. 701; [1952] 2 Q.B. 281.

(4) [1949] 2 All E.R. 508.

considerations lead me to the conclusion that "liable" does not mean "held liable by judgment". It means "responsible in law" for the damage.

If, however, the word "liable" means "held liable", then I think it plain that the words "if sued" must be expanded so as to read "if sued by the injured party at the time when the cause of action arose". If you are to envisage a hypothetical action, then you must envisage one brought in time to be an effective action and not one which is statute-barred. When the words "if sued" are so expanded, then there are two categories of tortfeasors against whom contribution can be claimed: (i) Those who have been sued and held liable; (ii) those who would, if sued in time, have been held liable. The third parties fall clearly within the second category of tortfeasors who would, if sued in time, have been held liable. It is no answer for them to say that they were in fact sued out of time. That only means that they are not within the first category of tortfeasors "held liable". It still leaves them inside the second category of those who, if sued in time, would have been held liable. I find myself in complete agreement with the reasoning of DONOVAN, J., on this point in *Morgan v. Ashmore, Benson, Pease & Co., Ltd.* (1).

Applying this interpretation of the statute to the facts of this case, it is quite clear that the first defendants are tortfeasors liable for the damage, and that the third parties are other tortfeasors "liable" for the damage in the sense that they are responsible in law as tortfeasors in respect of it. And, in any event, they would, if sued in time, have been "held liable" for it. The right to contribution is, therefore, complete.

One more question, however, arises. Although the first defendants have a right to contribution from the third parties, is their remedy for it barred by the one-year limitation contained in the Limitation Act, 1939, s. 21 (1)? This depends on when the cause of action for contribution arises. If it arises at the date of the accident (as *BIRKETT, J.*, held in *Merlihan v. A. C. Pope, Ltd.* (*Pagnello, Third Party*) (2)), then the remedy would be barred, but I do not think that is correct. It seems to me clear that a tortfeasor cannot recover contribution until his liability is ascertained. If he has not been sued and has paid nothing and admitted nothing, he can have no cause of action for contribution, for the simple reason that he may never be called on to pay at all. The damaged plaintiff may go against the other tortfeasor only. Once the liability of the first tortfeasor has, however, been ascertained by judgment against him or admission, then he has a cause of action for contribution against the second tortfeasor. He can obtain a declaration of his right to contribution and a prospective order under which, whenever the first tortfeasor has paid any sum more than his share, he can get it back from the second tortfeasor. A close analogy is the right of one surety to contribution from a co-surety. His right at law did not accrue until he had paid more than his share: *Davies v. Humphreys* (3); but his right in equity (which now prevails) arises when his liability is ascertained and the statute of limitations then begins to run: *Wolmerhausen v. Gullick* (4), *Robinson v. Harkin* (5). In cases where a writ is issued against the first tortfeasor and he serves a third-party notice against the second tortfeasor, the notice is convenient machinery, but it does not mean that he has then a cause of action. His cause of action only arises when judgment is given against him ascertaining his liability. On this footing, it is clear that

(1) [1953] 1 All E.R. 328.

(2) 109 J.P. 231; [1945] 2 All E.R. 449; [1946] K.B. 166.

(3) (1840), 6 M. & W. 153.

(4) [1893] 2 Ch. 514.

(5) [1896] 2 Ch. 415.

the remedy of the first defendants against the third parties is not statute-barred, because they put in their claim at once.

What is the actual period of limitation applicable to the right to contribution? At first sight it would appear to be the twelve months provided by the Limitation Act, 1939, s. 21 (1), because the third parties are a public authority and the action is brought "in respect of" neglect in the execution of their public duty. But the decision of this court in *Tuckwood v. Rotherham Corpn.* (1), in my view, binds us to hold that the words "in respect of" do not cover an action for indemnity where, beside the neglect, there are other ingredients necessary to give rise to the cause of action. The reasoning in that case covers this case also, and I do not think we should depart from it, especially in view of the injunction contained in s. 21 (2) of the Act. The period of limitation is, therefore, not the one year provided by s. 21 (1), but the ordinary period of six years provided by s. 2 (1). In this case, however, it does not matter, because in either case the first defendants brought their claim in time.

My conclusion is, therefore, that the first defendants have a right to contribution from the third parties. That right is not barred by statute, and they should recover. I would be in favour of allowing the appeal accordingly. In conclusion I would just say this. There is an obvious gap in s. 6 (1) (c) of the Act of 1935. The legislature did not have in mind the case of tortfeasors who had special defences available against the injured party, such as a public authority with a one-year limitation and a spouse who has immunity from suit. If the courts cannot close this gap, then I hope that Parliament will soon do so. It is fourteen years since the first case in the courts exposed the gap, and subsequent cases have served to show how wide it is.

**MORRIS, L.J.:** This case affords vivid illustration of the difficulties which can arise where different periods of statutory limitation of action apply to different tortfeasors who are concerned in respect of the same damage. The plaintiff suffered damage on July 28, 1949. When judgment in regard to his claims was delivered on Jan. 29, 1953, the learned judge held that the "blame" for his injuries should be assigned as to two-thirds to the first defendants and as to one-third to the third parties. But judgment had to be entered against the first defendants alone, for the plaintiff had not commenced his action against the third parties

"before the expiration of one year from the date on which the cause of action accrued."

The third parties had pleaded the Limitation Act, 1939, s. 21 (1), and that the claim of the plaintiff related to acts or omissions of the third parties while acting in intended execution of an Act of Parliament. No challenge has been made on appeal as to the correctness of absolving the third parties from liability to the plaintiff. The appeal only concerns the question whether the first defendants are entitled to contribution against the third parties. This question involves problems of great difficulty in regard to the construction of the Law Reform (Married Women and Tortfeasors) Act, 1935, s. 6 (1) (c). The only claim to contribution which the first defendants can, or do, assert is that which they can derive from the wording of that section. No considerations as to hardship or as to policy are relevant save as involved in any submissions based on the scheme and purpose of the Act. If certain public authorities can feel secure from claims after the lapse of a statutory period and after the safety

(1) 85 J.P. 101; [1921] 1 K.B. 526.



curtain of time has been thought to have been lowered, it might be said to be contrary to the intention of the legislature if this security can be indirectly assailed. On the other hand, it might be said to be inappropriate that the full burden should be carried by one tortfeasor when another shared his blame. But these and similar competing considerations must be excluded. The words of the section are to be regarded and rights and liabilities depend solely on the result yielded by the perplexing tasks of construction.

Prior to the Act of 1935, the first defendants could not have founded a claim to contribution against the third parties. If they have a right to contribution it is a statutory right. The first defendants' third-party notice against the third parties was dated July 6, 1951. It was amended on Mar. 11, 1952, after the plaintiff had joined the third parties as a defendant. In para. 3 of their amended statement of claim against the third parties the first defendants plead:

"In the event of the [first] defendants being held liable to the plaintiff in respect of damages or costs, they are entitled pursuant to the Law Reform (Married Women and Tortfeasors) Act, 1935, to, and claim, an indemnity or a contribution . . ."

In para. 6 of the amended defence of the third party to the first defendants' claim it is pleaded:

"Further the third party will say that at the time of the said collision, they, their servant or agent on their behalf, were acting in intended execution of the Civil Aviation Act, 1946, and that these third-party proceedings are barred by reason of the provisions of s. 21 of the Limitation Act, 1939."

The question as to the applicability of s. 21 (1) of the Limitation Act, 1939, to the claim of the first defendants against the third parties becomes involved with the question what rights are given by the Act of 1935 and when they are given. The first defendants' "cause of action" against the third parties is for contribution. Have the first defendants been given a right to contribution? If they have—at what moment did they first possess such right? What is the nature of any such right? Much depends on the meaning of the word "liable" in its context in s. 6 (1) (c) of the Act. The word "liable" is a very familiar one in legal parlance and as a medium of expression is much employed. If someone is said to be liable it is very likely that what is meant is that he is answerable at law, but no rigid or all-embracing definition can be suggested. The word may be employed with different meanings according to the context. In s. 3 of the Act of 1935 it is enacted that, subject to the provisions of the Act,

"the husband of a married woman shall not, by reason only of his being her husband, be liable—(a) in respect of any tort committed by her whether before or after the marriage, or in respect of any contract entered into, or debt or obligation incurred, by her before the marriage; or (b) to be sued, or made a party to any legal proceeding brought, in respect of any such tort, contract, debt, or obligation."

The word "liable" seems to have a different meaning according as applied to (a) or to (b). The husband is not to be "liable" for certain torts or contracts, and is not to be even "liable" to be sued.

The wording of s. 6 (1) is as follows:

"Where damage is suffered by any person as a result of a tort (whether a crime or not)—(a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage."

The words "judgment recovered against any tortfeasor liable" seem to suggest that being held liable is something different from being liable. But the later words "any other person who would, if sued, have been liable" seem to denote that a person is liable who would have been held liable if sued. The meaning of this part of the section is that judgment against one joint tortfeasor does not release another person who could also have been successfully sued as a joint tortfeasor.

The right to recover contribution which is given by s. 6 (1) (c) is given to a "tortfeasor liable in respect of" the damage suffered by some person. It is given against any other tortfeasor (whether a joint or a separate tortfeasor) "who . . . would if sued have been liable in respect of the same damage." The words "would if sued" appear to me to postulate the case of someone who has not been sued. In the case of such a person who has not been sued the inquiry becomes whether he would, if he had been sued, have been "liable". It seems to me that in this context the word "liable" must mean "held liable" or sued to judgment. Contribution may, therefore, be recovered from: (a) another tortfeasor who is liable; or (b) another tortfeasor who has not been sued, but who, if he had been sued, would have been liable. "Liable" under group (b) must mean "held liable", and in the context so it must in group (a). The result is that contribution may be recovered from (a) another tortfeasor who has been held liable to the plaintiff, or (b) from another tortfeasor who has not been sued, but who, if he had been sued, would have been held liable.

Parliament might have gone on to add some other group. There might have been provision to recover contribution from a tortfeasor who has been sued unsuccessfully, but who might—at some other time—have been sued successfully. But there is no such provision. Whether the omission be deliberate or inadvertent is matter of speculation. I agree with the view expressed by BIRKETT, J., in *Merlihan v. A. C. Pope, Ltd. (Pagnello, Third Party)* (1) that it would not be right to read after the word "sued" in the words "or would, if sued, have been" the words "in time".

I do not think that the word "liable" in the first line of s. 6 (1) (c) need be limited to tortfeasors who have been held liable, though this matter is not now directly in issue. In the context at the beginning of para. (c), the word may include one who has properly admitted liability to the person who has suffered damage. He may then recover contribution from another tortfeasor who either (a) has been held liable in respect of the same damage, or (b) has not been sued, but, if he had been sued, would have been held liable. It may be that in this situation the claimant would be more fortunately placed unless (in a case where the other tortfeasor has not been sued) the hypothetical proceedings must be deemed to have been commenced on the date of the admission of liability.

The conclusion which I have expressed makes it unnecessary to decide the question as to the notional date of the hypothetical proceedings in the case of a tortfeasor who has not been sued at all. Thus, if one tortfeasor is sued and held liable, while one who may be a tortfeasor is not sued, do the words "if sued" mean "if he had been sued at the time that the tortfeasor who has been held liable was sued", which is a very reasonable view and one which may avoid some anomalies, or do they mean "if at any time he had been sued"? If the view which I have formed is applied to the facts, the result appears to be as follows. The plaintiff Littlewood on July 28, 1949, suffered damage as the result of a tort. The first defendants never admitted liability, but by

(1) 109 J.P. 231; [1945] 2 All E.R. 449; [1946] K.B. 166.

the judgment given on Jan. 29, 1953, they were held liable. The first defendants came, therefore, within the opening words of para. (c) of the sub-section, i.e., the words "any tortfeasor liable in respect of that damage." They could as from then claim to recover contribution. It seems to me that their cause of action then arose. They could not earlier claim to recover contribution, for they were denying their liability to the plaintiff. They could (and did) serve a third-party notice on the third parties, which would give the latter the opportunity to challenge the claim of the plaintiff, but the claim of the first defendants on the third parties would only become effective contingently on the first defendants' being held liable to the plaintiff. I consider, therefore, that the third parties could not defeat the first defendants' claim in limine by asserting that more than twelve months had elapsed since the date of the accident (July 28, 1949) when damage was suffered by the plaintiff. Comparison was made between the present situation and that which exists between surety and co-surety, but the claim made by a surety who has paid is one based in contract and in equity. In *Craythorne v. Swinburne* (1) LORD ELDON, L.C., said:

"It has been long settled, that, if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt, or any part of it, that surety has a right in this court, either upon a principle of equity, or upon contract, to call upon his co-surety for contribution . . ."

The claim for contribution now under consideration is purely statutory and exists in the words of the sub-section or not at all. *Tuckwood v. Rotherham Corpn.* (2) arose out of the provisions of the Workmen's Compensation Act, 1906, s. 6 (2), comparable in scope to those of s. 6 (1) (c) of the Act of 1935. The language of the Public Authorities Protection Act, 1893, s. 1 (referred to in that case), does not differ significantly from that in the Limitation Act, 1939, s. 21 (1). Under the Act of 1893 the time is in general computed "next after the act, neglect, or default complained of"; under the Act of 1939 the time is "from the date on which the cause of action accrued". Under the Act of 1939 the time limit is in reference to claims which are

" . . . for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any neglect or default in the execution of any such Act, duty or authority . . ."

The wording of the Act of 1893 is very nearly the same. Though it is sufficient for present purposes to say that the claim for contribution was not defeated by any statutory period of limitation, the reasoning in *Tuckwood's* case (2) would suggest that the twelve months' period of limitation was not applicable.

In *M'Gillivray v. Hope* (3), which concerned contributions to be paid by former employers to the last employer of a man to whom such last employer had paid workmen's compensation, LORD TOMLIN said:

"Further, under the English law, where one who is liable to pay a sum of money to another is entitled against a third party to be indemnified in whole or in part against what he has so to pay, he cannot recover on the indemnity against this third party where he himself has made no payment in respect of his own liability . . ."

(1) (1807), 14 Ves. 160.

(2) 85 J.P. 101; [1921] 1 K.B. 526.

(3) [1935] A.C. 1.

Though the first defendants could start proceedings against the third parties to deal with the "event of" the first defendants being held liable to the plaintiff, and though such procedure possessed advantages, in my judgment, the first defendants were not obliged to claim against the third parties until they (the first defendants) were held liable to the plaintiff. In a claim against the third parties, the first defendants would first have to prove that they were tortfeasors liable to the plaintiff. They would then have to prove, if my construction of the Act is correct, either that the third parties had been held liable to the plaintiff, or that the third parties, not having been sued, would, if they had been sued, have been held liable. Though, if dealing with this second limb, they would be concerned with the neglect or default of the third parties in the intended execution of an Act of Parliament, the claim of the first defendants would, according to the reasoning in *Tuckwood's* case (1), be a claim in respect of the statutory right to contribution given by the Act of 1935. Thus, BANKES, L.J., in his judgment in *Tuckwood's* case (1) said:

"The question thus is, is this action claiming the right to the statutory indemnity an action in respect of any alleged neglect in the execution of any such duty? In my opinion it is not. It is true that in order to succeed in the action the plaintiff must establish that the workman would have been entitled to recover damages against the corporation for the negligence of their servant in driving the tramcar. That no doubt is an essential part of his cause of action; but I do not think that it is true to say that the action claiming the right to the statutory indemnity is an action in respect of any alleged neglect in the execution of a duty within the meaning of the language used in the section."

Both SCRUTTON, L.J., and ATKIN, L.J., agreed with the reasoning expressed by BANKES, L.J. Even if the claim of the first defendants against the third parties was in respect of any neglect or default in the intended execution of an Act of Parliament, the "cause of action", in my judgment, did not accrue until the first defendants could show that they were tortfeasors liable to the plaintiff. The careful judgment of DONOVAN, J., in *Morgan v. Ashmore, Benson, Pease & Co., Ltd.* (2), was not available to PARKER, J., before he gave his judgment in the present case. The difficulties of construction are well evidenced by the conflicting judicial opinions which have been formed.

For the reasons which I have given, I consider that the legislature has specified the description of those from whom contribution may be recovered in language which, on the facts of this case, does not enable the first defendants to recover from the third parties. I would dismiss the appeal.

*Appeal dismissed.*

Solicitors: *Stanley & Co.* (for the first defendants); *J. H. Milner & Son* (for the third parties).

F.A.A.

(1) 85 J.P. 101; [1921] 1 K.B. 526.  
(2) [1953] 1 All E.R. 328.



## COURT OF APPEAL

(SOMERVELL, JENKINS AND HODSON, L.JJ.)

July 27, 28, 1953

ACTON CORPORATION *v.* MORRIS AND ANOTHER*Requisition—Duration—Confirmation of requisition by Minister—Extension of period of requisition.*

On June 22, 1945, the plaintiffs, a local authority, requisitioned certain premises by virtue of powers delegated to them on the terms of the Ministry of Health Circular No. 2082 by the Minister of Health in pursuance of the Defence (General) Regulations, 1939, reg. 51 (5). Circular No. 2082 authorised the requisition of premises for the re-housing of persons rendered homeless by enemy action, and under para. 9 thereof, by reference to the enclosure in Ministry of Health Circular No. 1949, the procedure laid down to make such a requisition effective for more than one month was an application for an extension of time to be granted by or on behalf of the Minister. On July 13, 1945, the plaintiffs sent to the Ministry of Health a document in the following terms: "I . . . town clerk of Acton, in the exercise of the powers delegated to me under the terms of the Ministry of Health Circular No. 2082 by the Minister of Health and by virtue of reg. 51 of the Defence (General) Regulations, 1939, took possession of the premises . . . for the purpose of accommodating persons rendered homeless by enemy action". Then followed: "The Minister of Health hereby confirms the taking possession of the premises named . . ." and below was a blank space for a signature followed by: "For senior regional officer, Ministry of Health." On July 19, 1945, the senior regional officer confirmed the requisition. In 1952 the plaintiffs brought an action for possession of the premises, contending that the confirmation by the senior regional officer was equivalent to an extension of the requisition for an indefinite period.

HELD: the documents of July 13 and 19, 1945, were nothing more than a notification by the plaintiffs of the requisition of the premises and a confirmation by the Minister of that requisition and they could not be construed as an application for and the grant of an extension by or on behalf of the Minister; the procedure laid down for extending the period of requisition had not been complied with; and, therefore, the requisition had terminated one month from the date of the taking possession of the premises, and the plaintiffs were no longer entitled to possession.

APPEAL by the defendants from an order of His Honour JUDGE TUDOR REES at Brentford County Court dated Apr. 17, 1953.

On June 22, 1945, the plaintiffs, a local authority, through their town clerk served a notice of the requisition, "for accommodating persons rendered homeless by enemy action", of premises known as 35 and 37 Kent Road, Acton Green, W.4, in pursuance of powers delegated to them by the Minister of Health under reg. 51 of the Defence (General) Regulations, 1939, made under s. 1 of the Emergency Powers (Defence) Act, 1939. On July 13, 1945, the town clerk sent to the Ministry of Health a document in the following terms:

"I, Hugo Charles Lockyer, town clerk of Acton, in the exercise of powers delegated to me under the terms of the Ministry of Health Circular No. 2082 by the Minister of Health and by virtue of reg. 51 of the Defence (General) Regulations, 1939, took possession of the premises set out upon the accompanying schedule for the purpose of accommodating persons rendered homeless by enemy action."

At the bottom of the document were the words:

"The Minister of Health hereby confirms the taking possession of the premises named in the accompanying schedule."

Below these words was a blank space followed by: "For senior regional officer, Ministry of Health," and then a note:

"The Minister of Health may at any time direct that the possession of the premises named in the accompanying schedule shall cease."

On July 19 the senior regional officer confirmed the requisition. The Ministry of Health Circular No. 1949 which, by reference to Circular No. 2082, extended to the re-housing of persons rendered homeless by enemy action, provided that where (as in the present case) the requisition was limited to one month from the date of taking possession, any necessary application for the extension of the period must be made to the senior regional officer of the Ministry of Health.

The house, No. 35 Kent Road, had, before it was damaged by bombing, been divided into two flats, one on the ground floor and one on the first floor, and the first defendant, one Morris, had occupied the ground floor. When the house had been repaired Morris approached the plaintiffs who, in July, 1951, served notice on the then owners that they had given up possession of the ground floor flat. Morris went into occupation of that flat and in 1952 he purchased the entire house. He then let in the second defendant, one Smith, his brother-in-law, and his family to occupy the first floor flat. The plaintiffs objected to this on the ground that the flat was still in their possession and should be occupied by their own nominee. When they attempted to install their own tenant they were excluded by Morris who had put a new lock on the door of the house to which the plaintiffs had no key.

In an action by the plaintiffs for possession of the flat and damages for trespass the defendants contended that the plaintiffs were no longer in possession since the requisition had ceased one month from the date of the notice and they had made no application to the Minister for an extension of the time as required by Circular No. 1949, the document dated July 19, 1945, amounting only to a confirmation of the requisition. The county court judge held that the plaintiffs were entitled to possession of the flat and made an order for possession.

*J. R. Phillips* for the defendants.

*Wingate-Saul* for the plaintiffs.

**SOMERVELL, L.J.**, stated the facts and continued: There was some question as to the construction of the document of July 13, 1945, but, in my opinion, having regard to the words at the bottom and the blank space, it was a request by the town clerk to the Minister of Health, through the senior regional officer, to confirm the taking possession of the premises named in the schedule. The Defence (General) Regulations, 1939, reg. 51, dealt with the taking of possession, or, as it is normally called, the requisitioning, of premises for varying purposes of the war. It is common ground that there was power to delegate the powers which the Minister of Health had as a competent authority within the meaning of the regulation and that he did so delegate his powers for certain purposes and subject to certain restrictions to local authorities, including the plaintiffs in this action.

The first point taken for the defendants is that the delegated powers were not valid beyond a month, and, therefore, the requisition is now invalid. It will have been noted that the document of July 13, 1945, from the town clerk to the Ministry of Health referred to Circular No. 2082 as the circular under which possession was taken. It is a curious fact that when the plaintiffs amended their pleadings they said that they had taken possession under Circular No. 1857, to which I shall refer. It is conceded that, if they are held to their pleadings, they must fail, because Circular No. 1857 does not authorise the

taking of possession for the accommodation of persons rendered homeless by enemy action. We were told that that point was not taken below, and I think it is probably true that, if it had been taken, the learned county court judge would have allowed an amendment. In my view, if it became material, we would allow an amendment. I will proceed to consider the matter on the basis that it is open to the plaintiffs to say that they requisitioned these premises under Circular No. 2082 which was dated July 3, 1940, and covers the present subject-matter. In respect of the procedure with which we are concerned, it is provided by para. 9 (ii) that it should be in accordance with

"the conditions laid down in the enclosure to Circular No. 1949, except para. 3 (ii) and except that the exceptional procedure set out in para. 2 of that enclosure may be regarded as the normal procedure for the purpose of this delegation."

That is a little complicated. When, however, one turns to Circular No. 1949 one finds that it provides that normally approval by the Minister should be sought in advance of requisition, but it also provides for the exceptional procedure referred to under which requisition may be taken first subject to conditions to which I will refer in a moment. When we come to the procedure, in the enclosure to Circular No. 1949, para. 3 (i) reads:

"The requisitioning power is limited to the taking possession of (a) Houses or other residential buildings, in both cases if unoccupied; (b) Other buildings whether occupied or not."

Paragraph 3 (ii) is immaterial. By para. 3 (iii):

"The period of occupation of the building is not to extend beyond the period indicated to the clerk by the senior regional officer when consent is given to the requisition; or, in the case of premises requisitioned under the exceptional procedure set out in para. 2, beyond one month. In both cases any necessary application for the extension of the period should be made to the senior regional officer."

That last sentence contains the words on which this appeal turns. It is argued on behalf of the defendants that in the document of July 13, 1945, submitted by the town clerk to the Minister, there is no application for the extension of the period of one month for any period, and, therefore, the condition necessary to extend the requisition beyond a month has not been complied with. *Prima facie*, that seems to me to be right. The plaintiffs—and we are moving, I agree, in a technical field—sought to get over the difficulty which those words seem to create by referring to other circulars and to the general background of delegation under reg. 51. I am bound to say for myself that the further one probes into matters other than the directly relevant document, the more difficult does their case become. In Circular No. 1857, which was the admittedly inapplicable circular relied on in the pleadings, there was also a provision that the period of occupation was not to extend beyond one month from the date of taking possession, and then in para. 6 (iii) there are these words: "unless the requisition is confirmed by the Minister". In that circular, therefore, confirmation was regarded as the appropriate process for extending the time of requisition beyond the month, but, whether that provision was regarded as an inapt use of words or not, it is material to note that it was amended by para. 15 of Circular No. 1949, the procedure under that circular being assimilated to the procedure under Circular No. 2082 with which we are concerned. If one investigates these other matters there is attached to Circular No. 1949 Form C.S.2 to be submitted

to the Minister. The form submitted to the Minister on July 13, 1945, by the town clerk, was inaccurately headed "Form C.S.2." It does not set out everything which is set out in Form C.S.2. Form C.S.2, I think, emphasises the view which the defendants put before the court that confirmation is one thing and extension of time is another, because at the bottom of Form C.S.2 will be found these two sentences:

"The Minister of Health hereby confirms the taking possession of the land and/or premises named above",

and

"The period of occupation must not extend beyond — months from the date of taking possession unless the consent of the Minister is obtained."

Then there are the words:

"Note. The Minister of Health may at any time direct that the possession of the land and/or premises named in this application shall cease."

In my opinion, this is a case in which the principle to be applied is that those who are exercising special powers to take private property must see that they carry out accurately and in detail the Act of Parliament, or, in this case, the conditions of the requisitions under the circulars and Defence Regulations. Nor is it clear that this is a matter of no substance. All that has happened here is that there was confirmation by the Minister of something which did not require confirmation, namely, taking possession of the premises. There are no words to suggest that the Minister has been asked to extend the time or that he has done so. For these reasons I think this first point succeeds and that this appeal should be allowed.

If that is right, it is unnecessary to consider the second point which was whether, assuming that the plaintiffs still had the right to use the premises, they could get an order for possession or damages for trespass as all that the first defendant had done was to put a lock on his own door. It may be that the form of relief was not claimed in precisely the right way. It may be that the right of the local authority which the first defendant infringed was a right of access, but, if that had been the point, probably even at this stage it could have been put right by an amendment asking for the appropriate declaration.

**JENKINS, L.J.:** The plaintiffs' claim to possession of No. 35 Kent Road depends on their town clerk's requisition notice dated June 22, 1945, and the confirmation by the senior regional officer of the Ministry of Health of the town clerk's taking possession of the premises, dated July 19, 1945. They claim that those two documents, taken together, constituted a valid requisition of the premises which at all times thereafter remained, and is still, in force. The defendants contend that the requisition of the premises carried out by means of those documents ceased to have effect at the expiration of one month from the date of the town clerk's notice of requisition, that is to say, one month from June 22, 1945. This question turns on the true construction of those documents and of the circular letters issued by the Minister from time to time whereby he delegated, pursuant to the authority given him under reg. 51 of the Defence (General) Regulations, 1939, various requisitioning powers to local authorities.

The first of those circulars to which we were referred was Circular No. 1857 dated Aug. 27, 1939. That contains, in para. 6, this provision, headed "Requisitioning powers":

"Local authorities have in many cases already made arrangements for



the temporary use of unoccupied buildings for evacuation purposes, and it is not thought that the use of compulsory requisitioning powers will often be necessary. In order, however, to meet cases in which accommodation in unoccupied dwelling-houses or other buildings is urgently required for purposes of the government evacuation scheme and no arrangements with the owners have been found practicable, the Minister has decided to delegate to the clerks of local authorities the requisitioning powers conferred on him by reg. 51 of the Defence Regulations . . . The delegation is subject to the following restrictions: (i) The requisitioning power is limited to the taking possession of (a) Houses or other residential buildings, in both cases if unoccupied; (b) Other buildings whether occupied or not. (ii) The power is limited to the taking of possession of buildings for some purpose directly connected with the government's evacuation scheme under s. 56 of the Civil Defence Act, 1939, as, for example, the accommodation of persons transferred under the scheme or the provision of the accommodation for communal meals, etc., for these persons. (iii) The period of occupation of the building is not to extend beyond one month from the date of taking possession, unless the requisition is confirmed by the Minister."

It will be observed that the purposes to which those requisitioning powers relate are not relevant to the present case, for they were the purposes of, or directly connected with, the government evacuation scheme, and it is common ground that the requisitioning here in question had nothing to do with any such scheme. It is, nevertheless, important to note that under para. 6 (iii) the period of occupation of the building is not to extend beyond one month from the date of taking possession unless the requisition is confirmed by the Minister.

The next circular to which reference should be made is Circular No. 1949 dated Jan. 18, 1940. That circular related primarily to the occupation of premises for first-aid, ambulance, and mortuary purposes and purposes connected with the emergency hospital scheme. Those, again, are purposes not relevant to the present case. But para. 15 of Part 2 of Circular No. 1949 contains the following provision:

"The exercise by clerks to county borough and county district councils of the powers delegated to them by paras. 6 and 7 of Circular No. 1857 dated Aug. 27, 1939, will in future be subject to the conditions laid down in the enclosure to this circular."

The enclosure to the circular says:

"In A.R.P. Department Circular (No. — dated —) and issued by the Minister of Home Security it was announced that the requisitioning powers previously delegated to clerks for various civil defence purposes were, with one exception (the provision of public shelters), made subject to the condition that the prior consent of the regional commissioners should be obtained before possession of land or premises is taken over. The Minister has decided to adopt a similar procedure in relation to the taking possession of premises for purposes connected with the first-aid post, ambulance and mortuary services, and with the government evacuation scheme, and accordingly in future the consent of the department must be obtained before possession is taken."

There is a provision about applications for the purpose of obtaining consent, and para. 2 goes on:

"The only exception to this rule is the case where additional premises

are urgently required in extension of or in substitution for existing premises during or immediately following an air-raid. In these circumstances possession may be taken without reference to the department, although the senior regional officer should be informed as soon as possible thereafter."

Paragraph 3 contains limitations on the requisitioning power. The first relates to the character of the premises, and nothing turns on that here. The second also, I think, is immaterial. Paragraph 3 (iii) reads:

"The period of occupation of the building is not to extend beyond the period indicated to the clerk by the senior regional officer when consent is given to the requisition; or, in the case of premises requisitioned under the exceptional procedure set out in para. 2, beyond one month. In both cases any necessary application for the extension of the period should be made to the senior regional officer."

Thus, one finds that in the enclosure to Circular No. 1949 a new provision is introduced, to the effect that where the requisition is limited to the period of one month as having been made without prior consent, any necessary application for the extension of the period should be made to the senior regional officer, whereas in Circular No. 1857 the provision was to the effect that the period of occupation of the building was to be limited to one month unless the requisition was confirmed by the Minister.

Finally, there is Circular No. 2082 which dealt with the subject-matter here in question, that is to say, to put it very broadly, the re-housing of persons rendered homeless by bombing. That contained this delegation of powers in para. 9:

"The Minister accordingly, in exercise of his power under para. 5 of Defence (General) Regulation 51, hereby extends the powers already delegated to you to cover the taking possession of buildings for some purpose directly connected with the accommodation of refugees from enemy attack or the imminence of enemy action. The exercise of the powers now delegated will be subject to the following conditions, namely, (i) The power shall not be exercised in advance of the occasion on which the buildings are required; (ii) the conditions laid down in the enclosure to Circular No. 1949, except para. 3 (ii) and except that the exceptional procedure set out in para. 2 of that enclosure may be regarded as the normal procedure for the purpose of this delegation."

The result, therefore, was that in cases to which Circular No. 2082 applied it was permissible, as normal procedure, for a local authority to requisition without obtaining the previous consent of the Minister or the regional officer representing the Minister, but in such cases the duration of the requisition was limited to one month and any necessary application for the extension of the period was to be made to the senior regional officer.

Those being the relevant circulars, I should turn again to the two actual documents in this case. The requisition notice of June 22, 1945, does not expressly refer to Circular No. 2082, but a reference to that circular is implicit in the concluding words

"for accommodating persons rendered homeless by enemy action."

It was, therefore, a requisition under the powers delegated by Circular No. 2082 made without any prior consent from the Minister, and the position, accordingly, was, if I understand the circulars correctly, that the requisition effected by this notice could last only for the period of one month subject to the possibility of its being extended for some further period on an application for that purpose

being made to the regional officer. The plaintiffs rely on the senior regional officer's confirmation of July 19, 1945, as equivalent to an extension for an indefinite period. I cannot accept that view. The document to which such confirmation is attached on the face of it contains no more than a notification by the town clerk of what he has done, namely, the taking possession of the premises under Circular No. 2082. Appended as it is to such a document, the confirmation on behalf of the Minister is, on the face of it, no more than a confirmation of that which the town clerk has already done, namely, the effecting of a requisition to be valid for a period of one month. It is said that we should construe this document as recording an extension granted by or on behalf of the Minister, but I cannot construe it as anything more than a confirmation of the existing state of affairs.

My Lord has pointed out that additional force is given to the defendants' argument on this part of the case by the circumstance that in Circular No. 1857 the word used is "confirmation", whereas Circular No. 2082 refers to "extension". In a matter of construction it is always legitimate to assume that a change of language is intended to produce some difference in the meaning. Under the relevant circular in the present case the procedure laid down to make a requisition such as this effective for more than one month was an application for an extension to be granted by or on behalf of the Minister. No such application was made, and my conclusion is that no such extension was granted. I appreciate that, so far as the Minister himself was concerned, it would have been within his powers to requisition premises for an indefinite period for any authorised purpose, and I also appreciate that it would have been possible for him to delegate ad hoc authority to effect such a requisition in any particular case. If that course had been adopted, the result might well have been different, but that course was not adopted. The procedure followed was intended to comply with the provisions of the circulars, and for the reasons I have given I think it failed to do so. Accordingly, I agree that this appeal should be allowed. My conclusion in regard to the validity and duration of the requisition makes it unnecessary to decide the interesting question whether, even if the requisition had still been in force, any relief could properly have been granted against the first defendant, the owner of the premises, for the acts on his part alleged to have amounted to the exclusion of the plaintiffs from possession.

**HODSON, L.J.:** I agree with both the judgments which have been delivered and cannot usefully add anything.

*Appeal allowed.*

Solicitors: *Oswald Hanson & Smith* (for the defendants); *H. C. Lockyer*, town clerk, Acton (for the plaintiffs).

G.F.L.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 22, 28, 1953.

REG. v. BERKSHIRE COUNTY COUNCIL. *Ex parte* BERKSHIRE LIME CO. (CHILDREY), LTD.

*Road Traffic—Vehicle—Excise licence—Agricultural engine—Goods vehicle—Vehicles carrying lime—Vehicles (Excise) Act, 1949 (12, 13 and 14 Geo. 6, c. 89), s. 4 (2), s. 27—Finance Act, 1950 (14 Geo. 6, c. 15), s. 13.*

The applicants, Berkshire Lime Co. (Childrey), Ltd., owned three vehicles each consisting of an internal combustion engine and driver's cab mounted on a chassis on which was also imposed a receptacle to contain lime fitted with a device to enable the lime to be spread on the agricultural land over which the vehicle was driven. The applicants' business was to carry lime to the fields of farmers who employed their services and then spread it. They applied to the county council for excise licences at a lower rate for their vehicles as agricultural engines in accordance with s. 4 (2) of the Vehicles (Excise) Act, 1949, as amended by s. 13 of the Finance Act, 1950. The council, being of opinion that the vehicles were "goods vehicles" within the meaning of s. 27 (1) of the Act of 1949 which defines a "goods vehicle" as "a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise", refused to grant the application. The applicants obtained leave to apply for an order of mandamus directing the council to hear and determine the application according to law.

HELD: that, as s. 4 (2) of the Act clearly distinguished haulage from carriage and vehicles remained taxable at the lower rate only if they were used on the roads for the purpose of haulage, the council came to a right decision on the category into which the vehicles in question fell for purposes of tax, and the applications must be refused.

MOTION for an order of mandamus directing the Berkshire County Council to hear and determine an application made on Jan. 21, 1953, that three of the applicants' mechanically-propelled lime-spreading vehicles, registration numbers CUD353, CBW383 and ERX305, be granted road vehicle excise licences as agricultural engines in accordance with the Vehicles (Excise) Act, 1949, s. 4 (2) (a), as amended by the Finance Act, 1950, s. 13 (2). The applicants carried on business as quarry owners and merchants of and dealers in lime. The vehicles were loaded with lime at the quarries, and were then driven by road to farms where they were operated as lime-spreaders. The council contended that the vehicles were not agricultural engines within the meaning of s. 4 (2) (a) of the Act of 1949, but were goods vehicles within the meaning of s. 5 of that Act.

Leonard Caplan for the applicants.

J. P. Ashworth for the county council.

*Cur. adv. vult.*

July 28. The following judgments were read.

LORD GODDARD, C.J.: Counsel for the applicants moves for an order of mandamus directed to the Berkshire County Council commanding them to hear and determine according to law an application that three of the applicants' mechanically-propelled lime-spreading vehicles be granted road vehicle excise licences as agricultural engines in accordance with s. 4 (2) of the Vehicles (Excise) Act, 1949, as amended by s. 13 of the Finance Act, 1950. The point which has to be determined is this: Are these vehicles to be regarded as agricultural engines as the applicants contend or as goods vehicles as the county council contends? The difference in the duty payable is very considerable,



according to whether they fall into one class or the other. The vehicles in question are of a composite nature, consisting of an internal combustion engine and driver's cab mounted on a chassis on which is also imposed a large receptacle for the purpose of holding lime. The receptacle is fitted with a device for enabling the lime to be spread on the agricultural land over which the vehicle is driven, and the applicants' business is to carry lime to the fields of the farmers who may employ them and then spread it.

Section 4 of the Vehicles (Excise) Act, 1949, prescribes the duty chargeable in respect of the mechanically-propelled vehicles to which the section applies, and sub-s. (2), as amended by s. 13 of the Finance Act, 1950, is in these terms:

"This section applies to the following mechanically-propelled vehicles, that is to say—(a) locomotive ploughing engines, tractors, agricultural tractors and other agricultural engines, which are not used on public roads for hauling any objects, except as follows . . ."

and then in the following five sub-paragraphs are set out the articles which, and the circumstances in which, they may be hauled by these agricultural tractors and engines. The sub-section goes on to deal with a variety of other vehicles, such as those designed and constructed for trench digging and excavations and as mobile cranes which may be used under certain conditions on public roads, mowing machines, and certain other vehicles which it is unnecessary to mention. Section 5 of the Act provides for the duties payable in respect of a goods vehicle, and by s. 27 (1)

"'goods vehicle' means a mechanically propelled vehicle . . . constructed or adapted for use and used for the conveyance of goods or burden of any description, whether in the course of trade or otherwise."

In considering into which category these lime-spreaders, which are, undoubtedly, used for agricultural purposes, but also are constructed and used for the conveyance of lime, fall, it is necessary to refer to s. 1 of the Act. That reads:

"Subject to the provisions of this Act—(a) there shall be charged in respect of mechanically-propelled vehicles used on public roads in Great Britain the duties of excise provided by the next five following sections of this Act . . ."

It is clear, therefore, that the main purpose of the Act is to tax vehicles used on public roads. So long as a vehicle is not used on a road it escapes tax altogether. Once it comes on a road it becomes liable to tax unless it can be brought within an exemption. Section 4 (2) is dealing with mechanically-propelled agricultural vehicles which may, from time to time, come on to the public roads. They will remain taxable at the lower rate so long as they only are used on the roads for the purpose of hauling, but, if they are on the roads and are used for carrying goods, I can find no ground for saying that they are not taxable as goods-carrying vehicles. They must not be used on public roads for hauling any objects except those set out specifically in s. 4 (2), and that sub-section, so far as it relates to agricultural vehicles, is dealing with haulage and nothing but haulage. The Act clearly distinguishes between haulage and carriage. An agricultural vehicle is entitled to haul under certain conditions, but it is not entitled to be used for carriage, and that seems to me to dispose of the case and to show that the county council are right in the view that they have taken. In my opinion, the motion fails and must be dismissed,

PARKER, J.: I agree,

**DONOVAN, J.:** I agree. I add a few observations in order to deal with specific arguments of counsel for the applicants. There is no definition in the Act of "an agricultural engine." Counsel for the applicants suggests as a definition: "A machine by which power is applied to the doing of farming work, e.g., ploughing, sowing, manuring, etc." It is unnecessary for the purposes of the present case either to adopt or reject this definition, though, for my own part, I would not quarrel with it. "Goods vehicles" are defined by s. 27 (1) of the Act in terms which LORD GODDARD, C.J., has already quoted.

In my opinion, it is not possible to say that "agricultural engines" and "goods vehicles" are, within the meaning of the Act, mutually exclusive terms. The Act itself contemplates the contrary, for s. 4 (3) provides that some, only, of the vehicles charged under s. 4 (2) shall not be chargeable under s. 5. These excepted vehicles are mobile cranes. It follows that an "agricultural engine" may also be a "goods vehicle". In my opinion, that is true of the vehicles here in question, for they plainly carry goods, namely, the lime, which is going to be supplied to the farmer together with the service of spreading it. The lime which is to be so supplied and so spread cannot be regarded as akin to the petrol carried by a lorry for its own propulsion as counsel for the applicants suggests.

In these circumstances, why is the lime-spreader not chargeable under s. 5? The answer suggested is that s. 5, unlike s. 4, begins with the words: "Subject to the provisions of this Act", and this makes s. 4 paramount. If the words quoted were otherwise empty of content, there might be something to be said for this construction, but they are not. They refer, *inter alia*, to the numerous exemptions from duty contained in s. 7. There are, in addition, clear indications in the statute that, if a vehicle comes within s. 5 as a goods vehicle, it is to be taxed as such. The first is that contained in s. 4 (3), exempting, out of the whole category of s. 4 (2) vehicles, only mobile cranes from chargeability under s. 5. Another is s. 2 (3) which specifically exempts vehicles chargeable under s. 2 from chargeability under s. 3 or s. 5. It would be unnecessary to provide this specific exemption from s. 5 if the opening words of that section were enough. Here it is material to observe that the words: "Subject to the provisions of this Act" do not appear in s. 2 any more than they do in s. 4. Another indication is s. 13 (1), providing that, if a vehicle has been taxed under one category and is used for a purpose which brings it within another, taxed at a higher rate, the higher rate is to become chargeable.

These considerations make it clear, in my view, that, if a vehicle is a goods vehicle, it is to be taxed under s. 5, whether it is also an agricultural engine or not. For the reasons already stated I think the lime-spreader is a goods vehicle within the statutory definition. In this connection it is not uninteresting to observe that local authorities' water carts which spread water on the streets are specifically named in sched. IV to the Act as goods vehicles. For these reasons I agree that the motion should be dismissed.

*Application refused.*

Solicitors: *Rider, Heaton, Meredith & Mills*, agents for *Ormond & Fullalove*, Wantage (for the applicants); *Treasury Solicitor* (for the county council).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, J.J.)

July 29, 1953

BEWLAY & CO., LTD. v. LONDON COUNTY COUNCIL

*Metropolis—Building—Dangerous structure notice—Complaint before magistrate—  
Order that defendants "take down, repair or otherwise secure" premises—  
Statutory tenants in premises—Premises economically not worth repair—  
Discretion of magistrate—London Building Acts (Amendment) Act, 1939 (2 and  
3 Geo. 6, c. xcvi), ss. 62, 64.*

At a metropolitan magistrate's court a complaint was preferred by the London County Council charging Bewlay & Co., Ltd., the owners of premises known as 27 Store Street, Holborn, with having failed to comply with a dangerous structure notice served under s. 62 of the London Building Acts (Amendment) Act, 1939, as speedily as the nature of the case permitted, contrary to s. 64 of the Act. On May 19, 1952, the council served on the company a notice requiring them to "take down, repair, or otherwise secure such portions of the main front wall and the balconies on the main rear wall as are fractured, sagged out of perpendicular, loose, insecurely supported, or otherwise insecure and do any further work rendered necessary by the foregoing." On receipt of the notice the company at once shored up the premises to prevent any immediate danger. There were statutory tenants in the house, and the district surveyor had refused to exercise his power of certifying that it was necessary to remove them. The magistrate found that the premises were not such as would warrant the expenditure required to put them in a safe condition and a reasonable state of repair and that in normal times the building would doubtless have been demolished because it was not worth repairing from an economical point of view, but he held that he had no discretion and was bound to make an order in the exact terms of s. 64 requiring the company "to take down, repair or otherwise secure" the premises, and he made such an order accordingly. The company appealed.

HELD: that the case must be remitted to the magistrate with the opinion of the court that he was wrong in holding that he had not a discretion with regard to which of the three courses of action he would order and that it was open to him to order that the premises should be taken down.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction sitting at Clerkenwell a complaint was preferred by the respondent council against the appellants as owners of a structure known as 27 Store Street, Holborn, that on May 19, 1952, a notice was served on them in pursuance of the London Building Acts (Amendment) Act, 1939, Part VII (Dangerous and Neglected Structures), requiring them forthwith to take down, repair, or otherwise secure such portions of the main front wall and the balconies on the main rear wall of the structure as were fractured, sagged out of the perpendicular, loose, insecurely supported, or otherwise insecure, and do any further work rendered necessary by the foregoing, and that the appellants failed to comply wholly with such notice as speedily as the nature of the case permitted.

At the hearing it was proved or admitted that the premises consisted of a shop occupied by a tenant on the ground floor and living accommodation on the three floors above occupied by three other tenants, the first floor rooms being let furnished and the other two tenants being protected under the Rent Restrictions Acts as statutory tenants. After the notice of May 19, 1952, had been served the appellants shored up the premises by means of external supports and buttresses and they had remained so shored. Attempts were made to get the tenants on the second and third floors to vacate the premises and to find them alternative accommodation, but without success. It was found that the premises were a dangerous structure and would be dangerous to the inmates

if not shored up, that the district surveyor had refused to give a certificate under s. 67 of the Act (to the effect that the structure was dangerous to the inmates and enabling a court of summary jurisdiction to remove the inmates), and that the premises were not such as economically would warrant the expenditure required to put them in a safe condition and a reasonable state of repair and would in normal times have been demolished.

On behalf of the appellants it was contended that they had not failed to comply with the notice as speedily as the nature of the case permitted; that under s. 64 of the Act the learned magistrate had a discretion whether or not to make the order "to take down repair or otherwise secure" the premises and that this discretion should be exercised in the appellants' favour as the building was only fit to be pulled down, the expense involved in restoring it would be out of all proportion to its value, and that it would be highly dangerous to carry out the work with the tenants in occupation. On behalf of the respondents it was contended that the appellants had failed to comply with the notice; that under s. 64 (1) the powers vested in the court had to be exercised if the conditions specified in the sub-section had been satisfied and that the only order which the court had jurisdiction to make was "to take down repair or otherwise secure to the satisfaction of the district surveyor". The learned magistrate found that the appellants had failed to comply with the order and that he had no discretion but to make the order asked for.

*Rimmer, Q.C.*, and *Wiggins* for the appellants.

*H. E. Francis* for the respondents.

**LORD GODDARD, C.J.:** This is a Special Case which the court directed a metropolitan magistrate to state, arising out of proceedings taken by the London County Council against Messrs. Bewlay & Co., Ltd., as owners of a structure known as 27 Store Street in Holborn. A notice was served on them on May 19, 1952, as owners of the premises requiring them to

"take down repair or otherwise secure such portions of the main front wall and the balconies on the main rear wall as are fractured sagged out of perpendicular loose insecurely supported or otherwise insecure and do any further work rendered necessary by the foregoing."

The complaint alleged that the appellants had failed to comply with that notice as speedily as the nature of the case permitted.

The proceedings were taken under s. 62 and s. 64 of the London Building Acts (Amendment) Act, 1939. Section 62 provides:

"(1) The district surveyor upon completing any survey of a structure required to be made under s. 61 (2) . . . of this Act shall certify to the council his opinion of the state of the structure. (2) If the certificate is to the effect that the structure is not in a dangerous state no further proceedings shall be taken with respect thereto but if it is to the effect that the structure is in a dangerous state the council may shore up or otherwise secure the structure and may erect a proper hoard or fence for the protection of passengers and shall cause notice in writing to be served on the owner or occupier of the structure requiring him forthwith to take down repair or otherwise secure it as the case requires."

By s. 64 (1):

"If the owner or occupier on whom notice is served under s. 62 . . . of this Act fails to comply with the notice or the notice as amended or confirmed in accordance with the decision of the two surveyors or the award



of the arbitrator as the case may be as speedily as the nature of the case permits a court of summary jurisdiction on complaint by the council may order the owner within a time to be fixed by the order to take down repair or otherwise secure to the satisfaction of the district surveyor the structure or such part thereof as appears to the court to be in a dangerous state."

On receipt of the dangerous structure notice, the appellants, as the owners of these premises, at once shored them up to prevent any immediate danger. They were then summoned before the magistrate who made an order directing them to take down, repair, or otherwise secure the building. Their case was that they were willing to take down, but they were not willing to repair because to do repairs to this dilapidated old structure would cost far more than it was worth and to repair the house was an uneconomic proposition, the expenditure on which they could not justify.

The difficulty arises because there are some statutory tenants in the house, and the district surveyor refuses to exercise the power he has under s. 67, of certifying that it is necessary to remove them. The order that has been made on the appellants is to take down, repair, or otherwise secure. They are ordered to do one of three things. If they were ordered merely to take down the premises, they would be protected because the Rent Restrictions Acts have made provisions with regard to the tenants. But they were ordered to take down or repair, and it might hereafter be said against them: "You ought to have exercised the option given you by the order in a way which would not work to the detriment of the tenants who are in possession of part of the house". The magistrate has found that the premises are not such as economically would warrant the expenditure required to put them in a safe condition and a reasonable state of repair, and that in normal times the building would doubtless have been demolished as it is not worth repairing from an economical point of view, but he held that he was bound to make an order in the exact terms of the section, that is to say, to take down, repair, or otherwise secure. In my opinion, the magistrate was wrong in holding that he had no discretion. I think he had a discretion to say whether the appellants should take down, or whether they should repair, or whether they should otherwise secure. I am not saying that in a proper case the magistrate may not confirm the order in the words "take down repair or otherwise secure", but in the present case he held that he could only make an order in those terms, whereas it is quite clear as a matter of English that on the complaint he could order the owner to take down, or to repair, or otherwise to secure. Therefore, the case must go back to the magistrate with an intimation that he was wrong in holding that he had not a discretion as to which of these three courses he should order, and that, as he has found that the premises were not such as economically would warrant the expenditure required to put them in safe condition and a reasonable state of repair, it is open to him to order that the premises should be taken down. If such an order is made, the appellants will know where they stand and will, no doubt, at once obey. For these reasons the appeal must be allowed and the case must go back to the magistrate with that expression of opinion.

PARKER, J.: I agree.

DONOVAN, J.: I agree.

*Appeal allowed.*

Solicitors: *Bartlett & Gluckstein* (for the appellants); *J. G. Barr*, Solicitor, London County Council (for the respondents).

T.R.F.B.

QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 28, 30, 1953

REG. v. WELSHPOOL JUSTICES. *Ex parte* HOLLEY

*Justices—Procedure—Retirement with clerk—Desire for advice on legal points—Continuance of presence of clerk while facts considered—Shorthand writer sent for to read note.*

The applicant, Edward John Holley, a licensee, was convicted by a court of summary jurisdiction at Welshpool of having sold intoxicating liquor outside permitted hours, contrary to s. 4 of the Licensing Act, 1921. He obtained leave to apply for an order of certiorari to quash his conviction. The ground of the application was that the procedure adopted by the justices was irregular because at the hearing of the information the acting clerk to the justices retired with them and remained in their room while they were considering the facts and that a shorthand clerk, who had taken notes of the evidence, was sent for by the justices and went to their room with her notebook while they were deliberating, though the defendant was not made aware of the precise purpose for which her presence was required or what the purport was of the information which she gave to the justices. The justices, by their affidavit in objection, stated that, as several legal points had been raised by the defending solicitor, they wished to have advice from their clerk and requested him to retire with them. When considering some of the police evidence they desired to have their impression of it confirmed by the shorthand writer and she came into their room and read them a portion of her notes which confirmed their impression.

**HELD:** following *Reg. v. East Kerrier Justices. Ex parte Mundy* (1952) (116 J.P. 339), that the clerk's presence in the justices' room when they were deliberating should be only for the purpose of advising them on questions of law; in the present case the justices, as they required advice on law, did nothing wrong in taking the clerk to their room with them; the fact that the clerk continued to stay in the room while they were discussing the facts was not in itself sufficient to invalidate the justices' decision; the sending for the shorthand writer was not improper and could not have given rise to any reasonable misunderstanding, though it would be better in such circumstances for justices to return into court and ask the shorthand writer to read her note on any particular point they might require; and, therefore, certiorari should not issue in the present case.

**MOTION** for an order of certiorari.

On Apr. 14, 1953, the applicant, Edward John Holley, was convicted by a petty sessional court sitting at Welshpool, Montgomery, of having, on Mar. 7, 1953, sold intoxicating liquor outside permitted hours, contrary to the Licensing Act, 1921, s. 4, and was fined £5. He applied for an order of certiorari to quash the conviction on the ground that (i) the deputy clerk retired with the justices when they retired to consider their decision and remained with them for substantially the whole of their retirement, (ii) a shorthand writer employed in the deputy clerk's office, who had been present in court during the hearing, was required to retire to the justices' room while they were considering their verdict, (iii) in sending for the shorthand writer and considering or checking extracts of the evidence as recorded in her notebook in the retiring room and not in open court the justices deprived the applicant of knowing what part of the evidence they were considering or checking, of checking against the note taken by the applicant's solicitor whether the evidence in question taken down by the shorthand writer was accurate, and of drawing attention to any other evidence which might have been relevant to the passages the justices were considering or checking.

*P. L. W. Owen* for the applicant.

*Perrett* for the justices,

*Cur. adv. vult.*

July 30. The following judgment of the court was read by

**LORD GODDARD, C.J.:** Counsel for the applicant moves for an order of certiorari directed to the justices for the borough of Welshpool to bring up and quash a conviction of the applicant of selling intoxicating liquor out of permitted hours. The grounds on which the order is sought are irregularities at the hearing of the information in that the deputy clerk to the justices retired with them and remained in their room while they were considering the facts and that a shorthand writer was sent for by the justices and went to their room with her notebook while they were deliberating, though the applicant was not made aware of the precise purpose for which her presence was required or what the purport was of the information which she gave to the justices. From the affidavits it appears that at the hearing a question arose as to the admissibility of a letter which the applicant had written to the prosecutor. What possible objection there could have been to its admission we cannot conceive. The justices admitted it, and, so far as they were concerned, it would seem to have put an end to the matter as, if it was desired to contest its admissibility further, the remedy would have been by appeal. However, as the justices wished to have advice from the clerk on this matter, they required him to retire with them. Indeed, they say that several legal points had been raised by the defending solicitor requiring elucidation, but their affidavit does not state what they were beyond the relevancy of this letter. After an interval, it matters not for how long, the clerk came back into court and asked a young woman in his employment, who had been taking a shorthand note of the evidence, to go into the justices' room and take her notebook. In their affidavit the justices say that, after the legal points had been disposed of, they considered the evidence. They had formed certain impressions on the police evidence, but, before coming to a decision, they thought it advisable to have their impressions confirmed by the contents of the shorthand note, and the shorthand writer read to them a small portion of her notes, which confirmed their former impression. This affidavit, which is commendably frank, makes it quite clear that the clerk remained in the room while the justices were considering the facts and after he had given his advice on such matters of law as they required. It is also clear that nothing was said in open court as to what point in the police evidence required elucidation or what part of the note was read to the justices.

I do not think that anyone can misunderstand what the court meant by their judgment in *Reg. v. East Kerrier JJ. Ex p. Mundy* (1). It was that the clerk's presence in the room when the justices were deliberating should be only for the purpose of advising them on the law. In saying that, if they required his advice, they should send for him we did not mean, nor should I have thought there could be any misunderstanding on the matter, that, if a point of law had been raised during the hearing, the justices could not ask their clerk to come into the room with them when they retired so that they could at once consult him and then could consider the evidence in the light of his advice. Here the clerk went out with the justices, and, no doubt, stayed out with them while they were considering the facts and was present when some question arose on the evidence for which they thought it necessary to send for the shorthand writer. The latter fact shows that the justices needed to refresh their memories as to the evidence on some point on which, one may assume, there was discussion, and all this time the clerk remained in the room, and he still remained when his amanuensis was sent for. But it is clear that the

(1) 116 J.P. 339; [1952] 2 All E.R. 144; [1952] 2 Q.B. 719.

justices did nothing wrong in taking the clerk with them to their room as they required his advice on law, and in these circumstances we are not prepared to say, merely because he remained in the room while they were discussing the facts, that that in itself was sufficient to invalidate their decision. It is often difficult to disentangle what is purely a question of law from a question of fact, and a discussion on law must have regard to the particular facts of the case to which it is desired to apply the law. We think it would be putting too high a burden on justices who had legitimately required the presence of their clerk for the purpose of taking his advice to say at a particular moment: "Now you must leave the room while we deliberate further". At any rate, we are not prepared to say that what happened in this case, so far as the clerk's presence was concerned, should invalidate the conviction.

With regard to the presence of the shorthand writer, she was taking a note of the evidence to which the justices were entitled to refer. Had the clerk himself taken the note, even if he remained in court while the justices had retired, we cannot conceive that there would be any objection to their sending for his note to refresh their memory. Nor do we think that, in these circumstances, we can say that sending for the shorthand writer was improper. No one could have supposed that she had gone into the room for any purpose other than to read to the justices the evidence, or some of the evidence, which she had taken down. At the same time, it would be better, should this state of affairs arise again, if the justices came into open court and asked the shorthand writer to read his or her note on any particular point which they might require. Shorthand writers do occasionally make mistakes, though it is remarkable how few errors are made, but it would, we think, be better that this should be done in court where, if any question were to arise with regard to the accuracy of the shorthand note, it could be corrected. Justices will, I feel sure, recognise that it is their duty to obey a direction of this court not only in the letter but in the spirit, and that they are not to get round the direction which was given in the *East Kerrier* case (1) merely by pretending that they require the presence of their clerk to advise them when there is nothing but fact to be considered. In this case, as we have said, we think the justices were entitled to have their clerk in the room with them, and, as we do not think there could be any reasonable misunderstanding as to the reason why they sent for the shorthand writer, the court will not in its discretion order a certiorari to issue and this motion, accordingly, fails.

*Application refused.*

Solicitors: *Jaques & Co.*, agents for *Emrys Jones & Co.*, Welshpool (for the applicant); *Robbins, Olivey & Lake*, agents for *Gilbert Davies & Roberts*, Welshpool (for the justices).

T.R.F.B.

(1) 116 J.P. 339; [1952] 2 All E.R. 144; [1952] 2 Q.B. 719.



QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., PARKER AND DONOVAN, JJ.)

July 30, 1953

EDWARDS v. GRIFFITHS

*Road Traffic—Driving when uninsured—Persons covered “policy holder and any other person driving with [his] permission”—Proviso that person driving is not disqualified—Driver mentally defective—Road Traffic Act, 1930 (20 and 21 Geo. 5, c. 43), s. 4 (6).*

At a court of summary jurisdiction an information was preferred by the appellant, a police officer, charging the respondent with using a motor tractor when there was not in force in respect of it a policy of insurance as required by the Road Traffic Act, 1930, contrary to s. 35 (1) of the Act. On the day in question the tractor was driven by the respondent, a mentally defective lad, whose employer held a policy covering “the policy holder and any other person driving with the permission of the policy holder . . . provided the person driving holds a licence to drive the vehicle or has held and is not disqualified for holding or obtaining such a licence.

By s. 4 (6) of the Road Traffic Act, 1930 : “A person shall be disqualified for obtaining a licence . . . (b) if he is by a conviction under this Part of this Act or by an order of a court thereunder disqualified for holding or obtaining a licence.” The justices were of opinion that “disqualified” in the policy referred to disqualification by order of the court and that the insurers would have been on risk under the policy. They, accordingly, dismissed the information, and the appellant appealed.

HELD, that the justices were right in the interpretation which they put on the policy and that the appeal must be dismissed.

CASE STATED by Wiltshire justices.

At a court of summary jurisdiction sitting at Chippenham, on Apr. 9, 1953, the appellant, Henry Edwards, preferred an information against the respondent, Herbert Griffiths, charging that he used a motor tractor when there was not in force in relation to such user of the vehicle by him such a policy of insurance or such a security in respect of third-party risks as complied with the requirements of the Road Traffic Act, 1930, contrary to s. 35 (1) of the said Act.

It was proved or admitted that on Feb. 22, 1953, the respondent drove an agricultural tractor on a public highway; that the tractor was the property of D. O. Cooper, a farmer, by whom the respondent was employed, and the respondent was driving with Cooper's permission; that the respondent was not the holder of a current driving licence; that in October, 1951, he had passed a driving test and been granted a driving licence for twelve months, enabling him to drive motor cycles and tractors, but that in 1952 he was verbally informed by an official of the Wiltshire County Council that, as he was then under the supervision of the local health authority under the provisions of the Mental Deficiency Acts, 1913 to 1938, he must not drive his motor cycle; that no formal notice revoking the licence had been received by the respondent under s. 5 (4) of the Road Traffic Act, 1930; that since the expiration of his licence the respondent had applied for a licence and his application had been refused by the licensing authority, the respondent being informed that the authority had received notice that he, the respondent, was under the supervision of the local health authority under the Mental Deficiency Acts, 1913 to 1938; the certificate of insurance held by the respondent's employer provided for use of the vehicle by (a) the policy holder, (b) any other person with the permission of the policy holder, provided that the person driving held a licence to drive the vehicle or had held and was not disqualified for holding or obtaining such a licence.

For the respondent it was contended that, as he had previously held a

driving licence and had not been disqualified for holding or obtaining a licence, he was insured in respect of third-party risks under the employer's certificate of insurance. For the appellant it was contended that, as the respondent was prohibited from holding or obtaining a licence by virtue of his being under statutory supervision, he was automatically disqualified for holding or obtaining a licence within the meaning of the Road Traffic Act, 1930.

The justices were of opinion that "disqualified" in the insurance certificate meant disqualified by an order of the court in accordance with s. 4 (6) (b) of the Road Traffic Act, 1930, and not prohibited from obtaining a licence by reason of mental or physical disability, and they dismissed the information. The appellant now appealed.

*McGougan* for the appellant.

The respondent did not appear.

**LORD GODDARD, C.J.:** This case is a good illustration of the inconvenience of having to decide, in the absence of the insurance company, whether a policy covers a particular person at a particular time, but there is no provision in the Road Traffic Act, 1930, by which an insurance company can be brought in to take part in the argument on these matters. If the insurance company is, or would regard itself as being, on risk, the mischief which the compulsory insurance sections is intended to guard against does not arise, and it was for that reason that two years ago, with the sanction of the Home Office, it was arranged that police authorities who were in doubt whether a particular policy covered a particular driver at a particular time might consult the committee of underwriters at Lloyd's to find out whether or not in the particular circumstances they would regard themselves on risk. This course was not taken by the police authorities in this case. We have, therefore, in the absence of the insurance company, to decide whether the insurers would have been on risk if there had been an accident.

The facts show that the respondent was in the employment of a farmer who held a policy of insurance. If the master holds a policy of insurance, an employee who drives on his instructions is covered, provided the policy is not by its terms confined to the holder of the policy. It would be better in all these cases, and I desire police authorities to take notice of this, always to take the precaution of having the policy before the court. That can be done by issuing a subpoena requiring the assured to produce the policy to the court. According to the certificate, the persons covered by this policy were the policy holder and any other person driving with his permission. Therefore, *prima facie*, the respondent was covered. The certificate goes on to provide:

"Provided the person driving holds a licence to drive the vehicle or has held and is not disqualified for holding or obtaining such a licence."

[His LORDSHIP stated the facts and continued:] Section 4 of the Road Traffic Act, 1930, provides:

"(2) Subject to the provisions of this Part of this Act as to the physical fitness of applicants for licences, the licensing authority, except in the case of an applicant who is disqualified as hereinafter mentioned, shall on payment of a fee of 5s. grant a licence to any person who applies for it in the prescribed manner and makes a declaration in the prescribed form that he is not, under the provisions of this Part of this Act, disqualified by reason of age or otherwise for obtaining the licence for which he is applying . . . (6) A person shall be disqualified for obtaining a licence—

(a) while another licence granted to him is in force whether the licence is suspended or not; (b) if he is by a conviction under this Part of this Act or by an order of a court thereunder disqualified for holding or obtaining a licence."

The justices held that the words in the certificate of insurance "not disqualified for holding or obtaining such a licence" meant a disqualification by order of the court under s. 4 (6). In my opinion, they were right. It is true that, by reference to s. 4 (2) and s. 5, it may be argued that under the provisions of the Act relating to physical fitness and age a person may be said to be disqualified for obtaining a licence, but what we have to decide is whether or not as between the assured and the insurers these words "not disqualified for holding or obtaining such a licence" refer merely to the provision of disqualification by order of the court on conviction. *Prima facie*, the person who is driving with the permission of the policy holder is covered. It is further provided by the certificate that the person who is driving, whether he is the policy holder or a person driving with permission, must hold or must have held a licence to drive. The words "and is not disqualified for holding or obtaining such a licence" following immediately after the words "has held" seem to me to indicate clearly that the insurers are contemplating the case of a man who has held a licence, but has been disqualified for holding it, meaning disqualified for getting a new one or holding his current licence by reason of an order of the court. It is clear, as it seems to me, that as between the assured and the insurers we have to construe the certificate against the insurers, that is to say, if there is an ambiguity or a doubt as to its extent and the question were to arise as to the liability of the insurers, we should have to put the construction on the certificate most favourable to the assured, but I have come to the conclusion that the justices were right in the interpretation they put on this certificate of insurance, and, therefore, this appeal fails.

**PARKER, J.:** I agree.

**DONOVAN, J.:** Like **LORD GODDARD, C.J.**, I have not found this an easy case, but when I read in s. 9 (5) of the Act of 1930 that a person prohibited by reason of his age from driving shall be deemed to be disqualified, I think it is clear that "disqualification" in the Act has the restricted meaning given to it in s. 4 (6) (b) which is not the same as "prohibited". Then, when I find a certificate of insurance using in its language the language of the Act, I think "disqualified" in the certificate should receive the same restricted meaning. Therefore, I agree with the judgment proposed.

*Appeal dismissed.*

Solicitors: *Drury, Hopgood & Co.*, agents for *B. T. Ford*, Marlborough (for the appellant).

T.R.F.B.

CHANCERY DIVISION

(ROXBURGH, J.)

July 30, 1953

*Re T. (an infant)*

*Maintenance—Infant—Means of mother taken into consideration in assessing sum payable by father—Guardianship of Infants Act, 1925 (15 and 16 Geo. 5, c. 45), s. 3 (2).*

By an order, dated May 29, 1953, made by a metropolitan magistrate under s. 3 (2) of the Guardianship of Infants Act, 1925, the mother of two children was granted the custody of them and it was further ordered that the father should pay a weekly sum towards the maintenance of each child. In assessing the sum payable by the father the means of the mother were taken into consideration. On appeal by the mother,

HELD: the magistrate was entitled to take into consideration the means of the mother in assessing the amount of maintenance under s. 3 (2).

APPEAL from an order made by a metropolitan magistrate by which a father was ordered, under the Guardianship of Infants Act, 1925, s. 3 (2), to pay £1 per week towards the maintenance of each of his two infant children, the custody of whom had been given to the mother under the Guardianship of Infants Act, 1886, s. 5. The grounds of appeal were (i) that the amount ordered was inadequate; (ii) that the magistrate was wrong in law in that he took into consideration the means of the mother in assessing the amount of maintenance; (iii) that the magistrate was wrong in law in that he failed to consider what was reasonable maintenance for the infant having regard to the means of the father only; and (iv) that, in deciding the amount of maintenance, the magistrate failed to act in accordance with s. 3 (2) of the Act of 1925.

*Coode* for the mother.

*Seuffert* for the father.

ROXBURGH, J.: The stipendiary magistrate gave the custody of two children to the mother, and the mother asked for an order for maintenance. The Guardianship of Infants Act, 1925, s. 3, provides:

"(1) The power of the court under s. 5 of the Guardianship of Infants Act, 1886, to make an order as to the custody of an infant and the right of access thereto may be exercised notwithstanding that the mother of the infant is then residing with the father of the infant. (2) Where the court under the said section as so amended makes an order giving the custody of the infant to the mother, then, whether or not the mother is then residing with the father, the court may further order that the father shall pay to the mother towards the maintenance of the infant such weekly or other periodical sum as the court, having regard to the means of the father, may think reasonable."

Counsel for the mother deliberately abstained from calling evidence as to the mother's means and he submitted that, for the purposes of s. 3 (2), the means of the mother were wholly irrelevant. The magistrate took a different view, called the mother into the witness box, and took evidence from her as to her means. He made an order on that footing, expressly stating that he had taken the mother's means into account, so as to enable counsel for the mother to raise this point of law on an appeal. The result, therefore, is that,



if he was right in taking the means of the mother into account, his order stands, but, if he was wrong, the matter would have to be remitted to him for re-consideration. Therefore, the question is one wholly of law.

Counsel for the mother relied on s. 5 (4) of the Act of 1925, though, in my judgment, it is strongly against him. Section 5 provides:

"(1) The father of an infant may by deed or will appoint any person to be guardian of the infant after his death. (2) The mother of an infant may by deed or will appoint any person to be guardian of the infant after her death. (3) Any guardian so appointed shall act jointly with the mother or father, as the case may be, of the infant so long as the mother or father remains alive unless the mother or father objects to his so acting. (4) If the mother or father so objects, or if the guardian so appointed as aforesaid considers that the mother or father is unfit to have the custody of the infant, the guardian may apply to the court, and the court may either refuse to make any order (in which case the mother or father shall remain sole guardian) or make an order that the guardian so appointed shall act jointly with the mother or father, or that he shall be sole guardian of the infant, and in the latter case may make such order regarding the custody of the infant and the right of access thereto of its mother or father as, having regard to the welfare of the infant, the court may think fit, and may further order that the mother or father shall pay to the guardian towards the maintenance of the infant such weekly or other periodical sum as, having regard to the means of the mother or father, the court may consider reasonable."

The difference between s. 3 (2) and s. 5 (4) is manifest. There is no power under s. 3, if custody is awarded to the father, to order the mother to make any contribution towards the maintenance of the child, but under s. 5 there is a power to order not only the father but also the mother to make a contribution towards that maintenance by payment to a guardian. The difference between the two sections seems to me to indicate clearly that those words "having regard to the means of the mother or father" are linked up with the word pay—"pay . . . having regard to the means of the mother or father"—in s. 5 (4), and may well be similarly linked in s. 3 (2), where the mother is omitted because she never has to pay under s. 3 (2).

The point that is taken is that, by reason of the phraseology of s. 3 (2), the court is not entitled to take into account the means of the mother in assessing the quantum of maintenance. I am unable to adopt that view. The object of the section seems to me quite clear. It will be noticed that the section is permissive—the court may make such an order—and the court, in considering whether to exercise its discretion, has first of all to address itself to the needs of the infant as regards its maintenance. The phrase employed is "towards the maintenance of the infant", not "in satisfaction of" or "in discharge of", or anything of that sort. It is "towards the maintenance". The first thing that the court has to consider is: What does the infant need? For that purpose, the court has to consider, for instance, the age of the infant, whether it is at school or in a perambulator or at a university, and its standard of life hitherto is by no means immaterial. It would quite plainly be permissible to consider whether it had funds provided for its maintenance by some deceased parent or aunt. Why not consider how far its mother is able to maintain it? I can see no reason for excluding that one circumstance, which seems to me to be very relevant, from all the other relevant circumstances which have to be considered.

Counsel, quite properly, says: "Why, then, is there this reference to the means of the father?" To my mind, the reason is quite plain. The first thing one has to consider is what is reasonably required for the maintenance of the infant, but it may well happen that what is reasonably required for the infant is more than it is just to order the father to contribute, having regard to his financial position. He is the person who has to pay, and this is a safeguarding provision, and the reason why the mother is not mentioned there is because she never has to pay under s. 3 (2). The reason why the mother is mentioned in s. 5 (4) is because under that section she does sometimes have to pay.

Incredible results would follow if the court could consider, in exercising its discretion under s. 3 (2), only the means of the father—so incredible that counsel did not suggest that that was the interpretation. He says that it should be read as follows: "The court may further order that the father shall pay to the mother towards the maintenance of the infant such sum as the court may think reasonable, having regard to all relevant circumstances, including means, but, as to means, having regard to those of the father only". Section 3 (2) does not provide anything at all resembling that, and, as I do not find it difficult to construe the section without inserting any words, I am not prepared to insert words such as would be required to enable me to construe the section in the manner which counsel has suggested. It is, of course, no answer in law to say that counsel has for the first time raised this point on a section which has been applied without question on innumerable occasions, but it is comforting to me to feel that it is possible to give to this section a construction which has, I think, been adopted without question for nearly thirty years. Accordingly, in my judgment, this appeal must be dismissed.

*Appeal dismissed.*

Solicitors: *Hepburns* (for the mother); *F. W. Baldwin* (for the father).

R.D.H.O.

## COURT OF APPEAL

(SOMERVELL, JENKINS AND HODSON, L.J.J.)

July 13, 14, 15, 30, 1953

SWAN v. SWAN

*Cruelty—Defence—Insanity—Husband unable to understand nature and quality of his acts.*

*Condonation—Condonation of acts of insane person.*

For several periods during the married life the husband had been a voluntary patient in a mental hospital. During the intervals in which he had returned to the matrimonial home he had committed acts of cruelty towards his wife. On the hearing of the wife's petition for divorce on the ground of her husband's cruelty there was medical evidence which was accepted by the court that at the material times the husband did not know the nature and quality of his acts.

HELD: in these circumstances the husband was not capable of being guilty of cruelty to the wife.

Quaere, whether the husband could have been found to be guilty of cruelty if, while knowing the nature and quality of his acts, by reason of disease of the mind he had not known they were wrong.

Per HODSON, L.J. (with regard to condonation of cruelty committed by a person suffering from disease of the mind): I feel that the conception of forgiveness, which is always a necessary element in condonation is difficult, if not impossible,

where the object of the forgiveness is not capable of receiving it by reason of the fact that he is out of his mind.

*M'Naghten's Case* (1843) (10 Cl. & Fin. 200), applied.

*Lissack v. Lissack* (1950) (114 J.P. 393), overruled.

*Kirkman v. Kirkman* (1807) (1 Hag. Con. 409), explained.

APPEAL by the wife from an order of Mr. Commissioner GRAZEBROOK, Q.C., dated Apr. 24, 1953, dismissing her petition for a decree of dissolution of marriage on the ground of her husband's cruelty.

*Ifor Lloyd, Q.C.*, and *T. Dewar* for the wife.

*Horner and Stranger-Jones* for the husband.

*Cur. adv. vult.*

July 30. The following judgments were read.

**HODSON, L.J.:** This appeal is against an order of Mr. Commissioner GRAZEBROOK, Q.C., dismissing a petition presented by the wife on the ground of the cruelty of the husband. The husband, by the Official Solicitor, his guardian ad litem, denied the cruelty, and further said that, if he had been guilty of any uncondoned act of cruelty, he did not know the nature or the quality of the act and did not know the act was wrong and was not responsible for the act. The learned commissioner found that the husband had been guilty of cruelty up to and including August, 1947, but that such cruelty was condoned. He further found that later acts of violence inflicted on the wife and threats used by the husband against her took place at a time when the husband had proved that he did not know the nature of the acts and did not know they were wrong. Accordingly, he found that the cruelty proved had not been revived since the later acts and threats did not amount to cruelty in law, and dismissed the petition.

The case was conducted on the footing that no question arises as to the responsibility of the husband for his acts prior to and including August, 1947, and, although the history of the husband, as disclosed by the evidence, shows marked mental instability over a long period of his life, the evidence relied upon on his behalf is concentrated on the period beginning in August, 1949. During this period alone it was alleged and proved that he did not know the nature of his acts and did not know whether they were right or wrong. On Aug. 6, 1927, before the marriage, the husband had been certified and he was detained until Jan. 28, 1928, in a mental institution. The parties were married on Apr. 12, 1935. A son was born in 1936 and a daughter in 1940. In 1941 the wife for the first time learned that the husband had had either a nervous breakdown or something of the sort before marriage. Between Jan. 21 and Mar. 9, 1941, the husband was a voluntary patient at St. Ebba's Hospital. He was then at home with the wife until July, 1943, when he was suffering from tuberculosis. From that time until April, 1944, he was at a Bournemouth sanatorium. Between April, 1944, and August, 1947, he was at home when he again entered a tuberculosis hospital, this time at Headington, where he remained until some time in August, 1949. He then returned home where he remained until Sept. 20, 1949, when he was taken to the mental institution at Littlemore. On Oct. 6 he became a voluntary patient there until Nov. 10, when he discharged himself as recovered and went back to the tuberculosis hospital at Headington for further treatment. While at Headington he was visited by the wife on occasions and on Dec. 6, 1949, he returned as a voluntary patient to Littlemore where he has since remained.

Cruelty having been proved down to August, 1947, the first question is whether or not the cruelty was condoned. The violence of the husband continued until he went into hospital in August, 1947, when the wife called in

medical aid, and I do not think it could be said that such cruelty was condoned up to that time. Everything, therefore, turns on the circumstances which existed during the short period from August, 1949, until Sept. 20, 1949, when the parties were together for the last time. This period was very short. There was no sexual intercourse; this had ceased many years before. The husband was ill and in common humanity it was natural and reasonable for the wife to take him in. She and the children had nowhere else to go. She said in evidence:

"In August, 1949, he came home unexpectedly. I think he was discharged rather quickly. He was in a very bad state. He was very violent and very hopeless to live with."

She then described how he dug a hole in the garden to bury her in and said he was going to strip her and beat her through the village if she did not make him tea at one o'clock in the morning. Thereupon, she said she telephoned for the doctor who came and saw the husband. Admittedly, the wife did all she could for the husband during this period. She had welcomed him home as her husband although she was apprehensive of him, but I cannot see how her conduct in relation to this particular man, who did not know what he was doing, can be taken to be condonation. The element of forgiveness, albeit conditional forgiveness, is always present in condonation. VISCOUNT SIMON, L.C., in *Henderson v. Henderson & Crellin* (1), taking a case where a wife had been guilty of a matrimonial offence, said:

"The essence of the matter is . . . that the husband with knowledge of the wife's offence should forgive her and should confirm his forgiveness by reinstating her as his wife."

I feel the conception of forgiveness difficult, if not impossible, where the object of the forgiveness is not capable of receiving it by reason of the fact that he is out of his mind. I would, therefore, hold that the cruelty up to August, 1947, had not been condoned.

The learned commissioner, having decided that this cruelty had been condoned, was bound to consider the allegations of cruelty during the period beginning at some date in August, 1949, and ending on Sept. 20, when the husband was taken away for the last time, first to be kept under observation and later as a voluntary patient at Littlemore, where, apart from a short period in a hospital for tuberculosis at Headington, he has been ever since. During this period the husband was violent and behaved in a manner which can fairly be characterised as insane. I have already given some examples of his conduct. In addition, he threatened the wife with a razor blade under a delusion that there was an Indian outside the house who was in some way being encouraged by the wife. When he was at Littlemore he came under the care of Dr. Armstrong, physician superintendent of the hospital, who gave evidence that the husband was suffering from a schizophrenic illness of a paranoid type. He stated that, in his opinion, from the beginning of August it was probable that he did not know the nature of his acts and during the same period he would not have known whether they were right or wrong. In cross-examination, speaking of November, 1949, when he took his discharge, Dr. Armstrong said:

"I do not think any man whose mind is biased by the sort of ideas that were in his mind at that time is capable entirely of distinguishing between right and wrong."

Dr. Armstrong adhered to this opinion, and, so far as the period when the

(1) [1944] 1 All E.R. 44 ; [1944] A.C. 49.



husband was under the observation of this doctor is concerned, the latter was not contradicted by the expert who, not having seen the husband, was called to give medical evidence in support of the contention that the husband was responsible for his actions. After his discharge from Littlemore hospital, while he was in the tuberculosis hospital the delusions persisted on the occasions when the wife visited him. He threatened her with a razor blade, hinted at drowning her in a bath of water, and made an attempt to get her into the bathroom, made her sit in a chair, and talked of a man next door having a gun with a silencer. On Dec. 6 when he returned to Littlemore, he was hearing voices which told him to mutilate his wife with a razor. On this evidence the learned commissioner came to the conclusion, rightly as I think, that from the beginning of August, 1949, up to and including the occasions of the visits paid by the wife to him in November and December, 1949, the husband neither knew what he was doing nor whether what he was doing was right or wrong. Since the learned commissioner dismissed the petition for this reason and that ground has been challenged, it is, I think, right for this court to express its view on it.

It is to be observed that the learned commissioner found that the husband did not know what he was doing, thus bringing into play the first branch of the so-called M'Naghten rules. Apart from authority, I should have thought it was a contradiction in terms to describe as cruel the conduct of a person who did not know what he was doing. The word "cruel" carries with it implications of guilt which can no more be imputed to such a person than to a sleep walker. In this connection, I would cite the words of EVERSHED, L.J., in *Squire v. Squire* (1):

"I do not attempt any definition of the words 'cruel' or 'cruelty' save to say that the conduct complained of must at least satisfy the ordinary acceptance of those English words, and that, on well settled authority, it must be such as to have injured, in fact, the complainant's mental or physical health or be such as to cause real apprehension of such injury."

The Matrimonial Causes Act, 1857, s. 27, uses the phrase "guilty of cruelty". The Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (c) employs the phrase "treated . . . with cruelty", and this language is reproduced in the Matrimonial Causes Act, 1950. The word "guilt" carries with it the sense of wrong-doing, and, as HENN COLLINS, J., pointed out in *Astle v. Astle* (2), the word "treated" seems to connote a conscious action. In that case a decree was granted and the statement of law was obiter. It was to the effect that the rule in *M'Naghten's Case* (3) applied so that the husband, in resisting a charge of cruelty, must prove that he was labouring under such a defect of reason from disease of the mind as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know that what he was doing was wrong. This dictum was consistent with the judgment of the Court of Appeal in *Hanbury v. Hanbury* (4), cited by ASQUITH, L.J., in *White v. White* (5). LORD ESHER, M.R., is reported to have expressed himself to the following effect:

"The jury found that the respondent knew what he was doing when he committed the acts, and understood their nature and consequences . . . The jury were perfectly entitled to come to the conclusion they

(1) 112 J.P. 319; [1948] 2 All E.R. 51; [1949] P. 51.

(2) [1939] 3 All E.R. 967; [1939] P. 415.

(3) (1843), 10 Cl. & Fin. 200.

(4) [1892] P. 222; *affd.*, C.A., (1892), 8 T.L.R. 559.

(5) 113 J.P. 474; [1949] 2 All E.R. 339; [1950] P. 39.

did, and he thought that it was the only sensible conclusion at which they could have arrived. There remained a question of law. Assuming a diseased mind, and that the diseased mind gave him certain impulses—he would not call it an uncontrollable impulse, as he did not know what that meant in such a case as this—the respondent knew what he was doing, and that he was doing wrong. An act of adultery was a culpable act against the wife. He was prepared to lay down as the law of England that whenever a person did an act which was either a criminal or a culpable act, which act, if done by a person with a perfect mind, would make him civilly or criminally responsible to the law, if the disease in the mind of the person doing the act was not so great as to make him unable to understand the nature and consequences of the act which he was doing, that was an act for which he would be civilly or criminally responsible to the law. Consequently, even though the respondent's mind was diseased, he was as responsible to the law as if his mind was not diseased."

LORD ESHER, M.R., however, left open the question whether the converse proposition was correct. He said:

"There was a larger question which the President touched upon, but did not decide—namely, whether, even if the respondent's mind had been such that he did not know the nature of what he was doing or that he was doing wrong, the petitioner would or would not be entitled to a divorce."

The question was debated in the Scottish case of *M'Lachlan v. M'Lachlan* (1). There the cruelty founded on in a suit for separation was the defender's violent and threatening behaviour on an isolated occasion when, in consequence of a seizure, he was temporarily irresponsible. The defender contended that he could not be guilty of cruelty at a time when he was not responsible for his actions. It was argued that guilt required volition and that the court would be legislating if it extended the definition of cruelty so as to include involuntary conduct. LORD MONCRIEFF delivered the leading judgment of the First Division of the court. He stated the argument as follows:

"Seeing that the remedy is only given by our law on the ground *eo nomine* of cruelty, it was however courageously maintained by the appellant's counsel as their principal argument that this consequence must be affirmed in every case where the danger against which protection was asked had been occasioned by conduct for which the party charged with cruelty had not been responsible. Cruelty and guilt necessitated, to constitute either of them, both intention and malice; unconscious cruelty was indeed a contradiction in terms; and a man who was insane could thus not be guilty of cruelty."

Having stated the argument LORD MONCRIEFF went on to say:

"The proposition is entirely logical and, as regards certifiable insanity, may be affirmed without hesitation or difficulty."

He then went on to point out that in such a case a spouse had another remedy, but refused to accept the argument in the case in question where no such remedy existed. Regarding a decree of separation as the exact obverse of a decree of adherence, he declined to accept the proposition, regarding it as intolerable to do so where certification was not available as a remedy. This view, deliberately discarding logic, lays emphasis on the protective element in a decree of

(1) 1945 S.C. 382.

separation. In the Court of Appeal in *White v. White* (1), where the majority of the court decided the case against a respondent who was accused of cruelty on the ground that he knew the nature and quality of his acts, DENNING, L.J., took his stand on this very ground, saying:

" . . . it seems to me that, in divorce cases, if such a man has treated his wife with cruelty, she will be entitled to maintenance, judicial separation, or a divorce, because there again it is not a question of punishing him but only of giving her relief from a situation which has been rendered intolerable by his conduct. The presence of mental disease makes this relief more, and not less, necessary."

He cited the observations of LORD STOWELL in *Kirkman v. Kirkman* (2) where he said that in cruelty cases, if safety is endangered by violent and disorderly affections of the mind, it is the same in its effects as if it proceeded from mere malignity alone. DENNING, L.J., continued:

" . . . on the strength of his authority I say that a violent and disorderly affection of the mind, i.e., insanity, is of itself no answer to a petition for divorce on the ground of cruelty."

This judgment was not adopted by the other members of the court and ASQUITH, L.J., gave powerful reasons for taking a contrary view. It was, however, followed by PEARCE, J., in *Lissack v. Lissack* (3).

For my part, with all respect to those who think otherwise, I think that LORD STOWELL was far from saying that insanity in the sense covered by the M'Naghten rules will not relieve a person from legal responsibility for his acts in a suit founded on cruelty. Indeed, it can be said that all cruelty derives from violent and disorderly affection of the mind. LORD STOWELL's phrase was considered by the Judge Ordinary (SIR CRESSWELL CRESSWELL) in *Hall v. Hall* (4) where he said:

" With danger to the wife in view, the court does not hold its hand to inquire into motives and causes. The sources of the husband's conduct are, for the most part, immaterial. Thus, I have no doubt that cruelty does not cease to be a cause of suit if it proceeded from ' violent and disorderly affections ' as said in one case, or from ' violence of disposition, want of moral control, or eccentricity ', as said in another, or ' from a liability to become excited in controversy ', in the language of a third; but madness, dementia, positive disease of the mind, this is quite another matter."

This passage was cited as authoritative by TUCKER, L.J., in *Squire v. Squire* (5), to which I have already referred, and EVERSLED, L.J., in the same case used these words:

" If it be conceded, as, in my view, it must, that, in such a case as the present, proof of malevolent design is unnecessary, all, or almost all, acts of cruelty, not, in fact, malevolent, must proceed from some sickness or disorder of the mind, though in many cases falling short of insanity."

I respectfully agree with these observations and suggest that LORD STOWELL's dictum in *Kirkman v. Kirkman* (2) does not lend support to the view that

- (1) 113 J.P. 474 ; [1949] 2 All E.R. 339 ; [1950] P. 39.  
(2) (1807), 1 Hag. Con. 409.
- (3) 114 J.P. 393 ; [1950] 2 All E.R. 233 ; [1951] P. 1.  
(4) (1864), 3 Sw. & Tr. 347.
- (5) 112 J.P. 319 ; [1948] 2 All E.R. 51 ; [1949] P. 51.

insanity can be no defence to a charge of cruelty. Moreover, I can find nothing in the old authorities to justify the proposition that a decree based on cruelty is a remedy given, not for a wrong inflicted, but solely as a protection for the victim, as PEARCE, J., appears to have thought.

In *Hall v. Hall* (1) SIR CRESSWELL CRESSWELL said that, although the object of the court's interference was safety for the future, its sentence carried with it retribution for the past. The charge of SIR CHARLES BUTT, P., to the jury in *Hanbury v. Hanbury* (2), is often quoted in support of the "protection" view. He, however, used language which, although laying emphasis on protection, did not exclude the attribute of remedy for wrongdoing. He said:

"I conceive that the object of the Divorce Act is not so much, or nearly so much, the punishment or retribution for a marital offence as the protection of the party who is in peril."

I think, therefore, that PEARCE, J., went too far when he stated in *Lissack v. Lissack* (3):

"Since in petitions based on cruelty the duty of the court to interfere is intended, not to punish the husband for the past, but to protect the wife for the future, the question for the court is whether the wife can with safety to life and health live with the husband now."

In so far, therefore, as PEARCE, J., based himself on the proposition that, insanity could not be a defence to a petition based on cruelty, I am of opinion that *Lissack v. Lissack* (3) was wrongly decided.

To treat cruelty in the light only of need for protection would be to take it out of the realm of matrimonial offences altogether, which is not, to my mind, consistent with the language of the legislature nor with the decisions of the ecclesiastical courts which have laid the foundations of the law on this topic. Moreover, I confess that to me it seems that over emphasis on the need for protection of the victim tends to lose sight of realities. No effective protection is, in fact, provided by decree of the court from the violence of an insane spouse. The petitioner can only be protected in the same way as other members of the public, by the incarceration of the insane partner. If the insane spouse is not certifiable and cannot be incarcerated, it may well be that it is not only the other spouse who is in need of protection. If the respondent in *M'Lachlan v. M'Lachlan* (4) had been unmarried and looked after by a sister or a nurse the danger would have been the same. At least, where the insane person is unaware of the nature and quality of his acts—in other words, does not know what he is doing—I think it is not open to the courts to pronounce a decree of divorce or judicial separation on the ground of the cruelty of that person. If the violence of such a person is to be the ground of such a decree it is for the legislature so to provide. There are already grounds for divorce such as insanity (with certain limitations) and presumption of death which are outside the sphere of remedies for a wrong done by one spouse to another, but I cannot think that the courts can properly, by an extended interpretation of the phrase "treated with cruelty", add another ground to this class. The second limb of the M'Naghten rules does not, therefore, arise in this case and would,

(1) (1864), 3 Sw. & Tr. 347.

(2) [1892] P. 222; *affd.*, C.A., (1892), 8 T.L.R. 559.

(3) 114 J.P. 393; [1950] 2 All E.R. 233; [1951] P. 1.

(4) 1945 S.C. 382.



perhaps, arise but seldom. In *White v. White* (1) ASQUITH, L.J., thought it would be appropriate to apply it to a cruelty case where a person knew the nature of his acts, but, by reason of disease of mind, did not know they were wrong. SOMERVELL, L.J., and JENKINS, L.J., doubt whether this second limb applies to cruelty cases, having regard to the decisions in *Squire v. Squire* (2) and *Kaslefsky v. Kaslefsky* (3). It is not necessary to express a final opinion on this point, but I myself would incline to the opinion expressed by ASQUITH, L.J. The two branches of the rule have hitherto always been treated together and I am not satisfied that in civil as opposed to criminal matters they can properly be treated in isolation from one another.

In my opinion, therefore, the learned commissioner was right in refusing to make a finding of cruelty against the husband in respect of the acts done by him in 1949 and I would allow the appeal on the ground that there was no condonation of the earlier cruelty.

SOMERVELL, L.J., stated the facts and continued: The first point raised before the commissioner was whether the fact that the husband did not know the nature of his acts constituted a defence. Whether, in other words, to establish treatment with cruelty it is necessary that the nature of the acts should be known. Both sides relied on *Squire v. Squire* (2). That case decided that there could be a treating with cruelty within the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (c) although there was no intention to harm or hurt. On the other hand, reliance was placed in the judgments on the fact that the respondent knew perfectly well the nature of what she was doing. TUCKER, L.J., there quoted with approval the passage from *Hall v. Hall* (4) which HODSON, L.J., has already read. In a later passage on the same page he clearly distinguished from the case with which he was dealing a case in which the respondent did not know the nature and quality of the acts committed by her and relied on as cruelty. EVERSHED, L.J., at the outset of his judgment emphasised that the respondent remained at all material times responsible for her actions. In *Kaslefsky v. Kaslefsky* (3) the principle laid down in *Squire v. Squire* (2) was considered, and it was held that the conduct complained of must be aimed at or actually physically directed at the petitioner or done with intent to injure him or to inflict misery on him. BUCKNILL, L.J., in his judgment, emphasised the importance of the word "treated" in the Supreme Court of Judicature (Consolidation) Act, 1925, s. 176 (c) which deals with this matter. In *White v. White* (1), although it was unnecessary to decide the point which we have to decide, observations were made on it both by ASQUITH and DENNING, L.JJ. ASQUITH, L.J., referred to the earlier cases in which the problem was referred to, and he inclined to the view that, if the respondent did not know what he was doing or did not know it was wrong, this would be a defence. DENNING, L.J., took the opposite view, at any rate in certain circumstances. He thought it would make a difference if the petitioner realised that the respondent was of unsound mind. He said:

"I can well understand that a point might be reached when the conduct was so irrational that it was obvious to the injured party that the conduct was not cruelty, but was due to mental disease."

I do not wish to base too much on the precise wording of this sentence, but

(1) 113 J.P. 474 ; [1949] 2 All E.R. 339 ; [1950] P. 39.

(2) 112 J.P. 319 ; [1948] 2 All E.R. 51 ; [1949] P. 51.

(3) 114 J.P. 404 ; [1950] 2 All E.R. 398 ; [1951] P. 38.

(4) (1864), 3 Sw. & Tr. 347.

its wording seems to assume that conduct due to mental disease cannot be cruelty.

The question came before the Court of Session in *M'Lachlan v. M'Lachlan* (1), where the acts complained of were done in an epileptic seizure. LORD MONCRIEFF admitted the logic of the proposition that unconscious cruelty is a contradiction in terms, and affirmed that proposition with regard to certifiable insanity. Where, however, the condition is not certifiable, the wife—so the argument runs—needs protection, and the logic, or as I would respectfully put it, the ordinary meaning of the words used in s. 176 (c) of the Act of 1925, must give way. In the present case the husband may have been certifiable. The meaning of s. 176 (c) of the Act of 1925 cannot depend on whether the husband is certified or is a voluntary patient. I have come myself to a clear conclusion that if a respondent does not know the nature of the acts they cannot be relied on as establishing a "treating with cruelty". I agree that *Lissack v. Lissack* (2) was wrong so far as it decided that insanity could not be a defence.

In the observations in *White v. White* (3) it was assumed that the relevant test in a case of this kind was that applied in criminal cases and referred to as the M'Naghten rules. Applying *Squire's case* (4) and *Kaslefsky's case* (5), I doubt whether this is right. I would have thought that, if the husband knew the nature of his acts, it would be no defence for him to say that he did not know they were wrong: *Squire v. Squire* (4). On the other hand, it might be a defence if it could be established that he did not know they were directed against the wife. It may be difficult to think of circumstances in which a man would know the nature of his acts, but would not know against whom they were aimed.

The wife, therefore, being unable to rely, in my opinion, on the acts in 1949 has an alternative in the acts prior to 1947. The learned commissioner found that they had been condoned, and that is the only defence suggested. The first question is whether they were condoned prior to the husband's departure for hospital in 1947. I do not think they were. Sexual intercourse had ceased between these parties in 1941. Notwithstanding this, the wife might de die in diem condone acts of cruelty, and it is not, of course, a case in which she left the home. When, however, one considers the evidence as to the circumstances in which the husband went to hospital, I am of the opinion that she had not condoned the acts complained of. The material answers are as follows:

"Q.—Take the month of August, 1947. In other words, the last, shall we say, few weeks before he went to the Osler Pavilion. If you can, throw your mind back to that for one moment. Were there any acts of violence during that period? A.—I believe so. I believe I wrote to the doctor and told him about my husband's behaviour and asked him if he could help me. He said he would take him into the Osler Pavilion. Q.—Can you tell my Lord when your husband went to the Osler Pavilion (I understand it to be in August, 1947), when was the last act of violence—how long before he went—that you complain of? A.—My husband was frequently violent. I cannot fix a date at all, except I knew I could not carry on as things were going. Q.—I appreciate that; but I wonder whether you could help my Lord as to how long before he went into the Osler Pavilion was the

(1) 1945 S.C. 382.

(2) 114 J.P. 393; [1950] 2 All E.R. 233; [1951] P. 1.

(3) 113 J.P. 474; [1949] 2 All E.R. 339; [1950] P. 39.

(4) 112 J.P. 319; [1948] 2 All E.R. 51; [1949] P. 51.

(5) 114 J.P. 404; [1950] 2 All E.R. 398; [1951] P. 38.

last act of violence? Was it one month, one week? A.—One week, perhaps. I cannot put it nearer than that. Q.—Try if you can. Consider the time from the last act of violence up to the time that he went to the Osler Pavilion. Were you then living a comparatively normal married life together during those last few days? A.—I believe so, yes. Q.—Were you looking after him like a wife would? A.—Yes. My husband was an invalid; I always looked after him. Q.—Can you give my Lord some idea—remembering that it was some time in August, 1947, that your husband went away to the Osler Pavilion? A.—It was probably just before that, because I was so afraid—getting so afraid of my husband—I was at my wits' end to know what to do. I wrote to the doctor. Q.—When you say 'just before that'—by 'that', do you mean about a week? A.—A day or two, I think. A week, may be. A day or two, probably. Q.—A week, may be; a day or two, probably. A.—Yes."

The next question is whether she condoned what had happened before 1947 by taking him back in August, 1949. According to her evidence, which was not challenged on this point, he came home unexpectedly, he was in a very bad state, he was very violent, and was very hopeless to live with. She then goes on to describe the distressing acts which he performed, which, as I have said, would have been cruelty if he had known what he was doing. She was, in fact, a trained nurse, although my decision is not affected by this fact. Condonation is defined as the re-instatement in his or her former marital position of the spouse who has committed a matrimonial wrong with the intention of forgiving and remitting on condition that the spouse whose wrong is so condoned does not henceforward commit any further matrimonial offence: see *RAYDEN ON DIVORCE*, 6th ed., p. 177. It would, of course, be absurd to suggest that the mere fact that she took him in when he was unexpectedly discharged amounted to condonation. Very shortly after that he started the acts complained of. She summoned the doctor and ultimately got a friend in the village to telephone and he was removed. Having cited the definition, I think it is unnecessary to elaborate the reasons which lead me to the conclusion that there was no condonation by reason of what happened in 1949. In those circumstances, I think the wife is entitled to a decree and that the appeal should be allowed.

**JENKINS, L.J.:** I agree, and only desire to add, with respect to insanity as a defence to a charge of cruelty, that in the present case the medical evidence accepted by the learned commissioner was, as I understand it, to the effect that the husband, during the final period, not merely did not know that what he was doing was wrong, but did not even know the nature and quality of his acts, or, in other words, did not know what he was doing. I am satisfied that for the reasons given by my Lords a man who does not know what he is doing cannot be held to be guilty of cruelty to his wife or to treat his wife with cruelty. But I am not satisfied that the position is necessarily the same if a man's state of mind is such that while he does know what he is doing he does not know that what he is doing is wrong, and I would prefer to reserve that question for further consideration in a case in which it is necessary to the decision.

*Appeal allowed.*

Solicitors: *A. M. V. Panton*, the Law Society (for the wife); *Official Solicitor*.  
G.F.L.B.

## PROBATE, DIVORCE AND ADMIRALTY DIVISION

(WILLMER, J.)

July 27, 28, 29, 30, 31, 1953

BRIGHT v. BRIGHT

*Divorce—Desertion—Constructive desertion—Previous suit charging adultery and cruelty dismissed—Allegations in petition alleging desertion same as those raised, or capable of being raised, by earlier petition.*

The wife filed a petition, dated Apr. 21, 1950, for divorce on the ground of the husband's adultery with his half-sister, L.B.T., and cruelty. The allegations of cruelty were, *inter alia*, that in or about 1927 the husband threatened the wife with a revolver; that in or about 1928 he threw several of the wife's belongings out of the window and threatened to throw her out of the house; and that, in the early part of 1932, he threatened to attack the wife with a knife, broke a finger of her left hand, and punched her in the right eye. The charges were denied by the husband, and on Jan. 22, 1952, the wife's petition was dismissed. The wife then filed a petition, dated Oct. 2, 1952, for divorce on the ground of the husband's desertion, alleging, *inter alia*, that from about 1926 the husband frequently quarrelled with and abused the wife; that in 1927 she had become suspicious that the husband was carrying on an improper association with L.B.T., and that when she asked the husband to see less of L.B.T. their relationship became further strained; that between 1927 and 1930 the husband kept her short of money and frequently told her that he no longer wanted her and wished that she would go; that in April, 1930, when the wife refused to share a bedroom with L.B.T., the husband left the house with L.B.T. to find other accommodation; and the wife repeated the three allegations in her former petition relating to the revolver, throwing her belongings out of the window, and breaking her finger, and said that by such conduct the husband had in April, 1932, driven her from the matrimonial home. The husband, by his answer, denied the charge of desertion and pleaded that the wife was estopped *per rem judicatam* from making any of these allegations. On these preliminary issues,

**HELD:** it was necessary in proceedings in the Divorce Division to distinguish between an estoppel as against a party charged with an offence and an estoppel as against a party putting forward a charge against the other party; in the latter event, as here, no interest of the public was infringed by saying that a party was estopped *per rem judicatam* from repeating allegations that had previously been the subject of judicial determination, and, therefore, the ordinary rules of estoppel applied: *Hudson v. Hudson* ([1948] 1 All E.R. 773), distinguished; and, accordingly, (i) since the allegation of adultery had been dismissed in the previous suit the wife could not now allege that she had reasonable grounds for belief in such adultery and the allegations relating to this would be struck out; *Allen v. Allen* (1951) (115 J.P. 229), applied; (ii) the allegations of threats of violence and of actual assault, which repeated the allegations in the previous petition, would also be struck out since the acts alleged either did or did not amount to cruelty, and if, as had been held in the earlier suit, they did not amount to cruelty, they could not now be relied on as "grave and weighty matters" to support a charge of constructive desertion, for by their very nature the acts either constituted cruelty or amounted to nothing: *Dixon v. Dixon* ([1953] 1 All E.R. 910) and *Foster v. Foster* (ante, p. 377), distinguished; *Timmins v. Timmins* ([1953] 2 All E.R. 187), considered; (iii) the allegations that the husband had quarrelled with and abused the wife, had kept her short of money, and had frequently told her that he no longer wanted her and wished that she would go, had not been specifically raised in the previous proceedings, but could and should have been raised in support of the charge of cruelty then made, and, therefore, those allegations would also be struck out: *Hoystead v. Taxation Comr.* ([1926] A.C. 155), applied; (iv) the remaining allegation, that the husband left the wife in April, 1930, raised a case of simple desertion which had not been investigated in the former suit, and, therefore, would not be struck out, and the wife would have leave to amend her petition to enable her to charge her husband with simple desertion at that date.

**PETITION** by the wife for dissolution of marriage.

The parties were married in Sierra Leone on Jan. 15, 1911. There were three



children of the marriage. The parties were African and were domiciled in Sierra Leone, but they came to England for some time in 1930 and later returned to Sierra Leone. On Apr. 30, 1932, the wife filed in the Supreme Court of Sierra Leone a petition for judicial separation on the ground of the husband's cruelty, but the wife did not proceed and the petition remained on the court file. Ever since April, 1932, the parties had lived separate and apart. In 1942 the wife came to England and had remained in England ever since. The husband, who was a doctor, remained in Sierra Leone. The wife filed a petition dated Apr. 21, 1950, for dissolution of the marriage, in which she alleged that the court had jurisdiction to entertain the petition on the ground that she had been resident in this country for the preceding three years, in accordance with the Law Reform (Miscellaneous Provisions) Act, 1949, s. 1 (now the Matrimonial Causes Act, 1950, s. 18 (1) (b)). She further alleged that the husband had committed adultery with one L.B.T., his half-sister, and the petition continued:

" 12. That the [husband] has since the celebration of the marriage treated the [wife] with cruelty. 13. That in or about 1913 at Park House, Garrison Street, Freetown aforesaid, the [husband] struck the [wife] a violent blow on the thumb with a stick, breaking the skin and causing severe bruising. 14. That in or about 1915, at Park House, Freetown aforesaid, the [husband] pushed the [wife] violently against the corner of a bed post, and her left eye was thereby severely cut and bruised. 15. That in or about the year 1926, at the White House, Freetown aforesaid, the [husband] struck the [wife] a violent blow on the head with a shoe. 16. That in or about 1927 at the White House, Freetown aforesaid, the [husband] drew a revolver from his pocket and threatened to shoot the [wife]. 17. That in or about 1928 the [husband], who frightened the [wife] by the violence of his temper, threw several of her belongings out of the window of the White House, Freetown aforesaid, and threatened to throw her out of the house. 18. That in January, 1932, when the [wife] was living apart from the [husband] at the White House, Freetown aforesaid, the [husband], in an angry and threatening manner, entered the said house with some half dozen persons against the will of the [wife] and forced her to run from the house and seek the protection of the police. 19. That in or about the early part of 1932 at the White House, Freetown aforesaid, the [husband] advanced towards the [wife] with a knife in his hand, threatening to attack her. A violent struggle took place between the [husband] and . . . a nephew by marriage of the [wife], who was present and who came to her assistance. The [husband's] knife was taken from him, but he broke free, seized the [wife] by her left hand and broke her finger by twisting it, he then struck the [wife] a violent blow with his clenched fist in her right eye. 20. That from the early days of the marriage the [husband] caused the [wife] great distress and anxiety by his frequent demands for large sums of money. 21. That the [wife] has by reason of the [husband's] conduct suffered injury and risk of injury to her health."

The husband, by his answer, denied the allegations of adultery and cruelty. The suit was heard by Mr. Commissioner BUSH JAMES, Q.C., who dismissed the petition on Jan. 22, 1952.

By a petition dated Oct. 2, 1952, the wife now sought a dissolution of the marriage on the ground of desertion, and alleged :

" 8. That the [husband] has deserted the [wife] without just cause for a period of three years immediately preceding the presentation of this petition, to wit, from and since about the month of March, 1932. The circumstances

of the desertion are set out in paras. 9, 10, 11, 12, 13, 14, 15, 16, 17 and 18 hereof. 9. That from about the year 1926 the attitude of the [husband] towards the [wife] changed and the [husband] frequently quarrelled with and abused the [wife]. 10. That during the year 1927 the [wife] received a letter from the [husband], who was in England, from which the [wife] became suspicious that the [husband] was carrying on an improper association with his half-sister, [L.B.T.]. 11. That when the [husband] returned to the matrimonial home, the White House, Freetown, Sierra Leone, he refused the [wife's] request that he should see less of the said [L.B.T.], and relations between the [wife] and the [husband] became further strained. 12. That between the years 1927 and 1930 the [husband] habitually kept the [wife] short of money. 13. That between the years 1927 and 1930 at the White House, Freetown aforesaid, the [husband] frequently told the [wife] that he no longer wanted her and wished that she would go. 14. That in or about the year 1927 at the White House, Freetown aforesaid, the [husband] threatened the [wife] with a revolver. 15. That in or about the year 1928 at the White House, Freetown aforesaid, the [husband] threatened to throw the [wife] out of the house, and in fact threw some of her belongings out of a window and told her to go. 16. That in or about the month of April, 1930, at 18, Albany Road, Stroud Green, in the county of London, when the [wife] refused to share a bedroom with the said [L.B.T.], the [husband] refused to stay in the same house with the [wife], and left forthwith to find alternative accommodation with the said [L.B.T.], and the [husband] did not return to the [wife] while they remained in England. 17. That in or about the month of March, 1932, at the White House, Freetown aforesaid, the [husband] threatened the [wife] with a knife, broke one of her fingers by twisting it, and struck her a violent blow on her right eye with his clenched fist. 18. That by his conduct as aforesaid the [husband] evinced an intention to drive the [wife] from the matrimonial home with the object of bringing cohabitation between the [wife] and the [husband] permanently to an end; and that the [wife] was thereby in or about the month of April, 1932, driven from the matrimonial home at the White House, Freetown aforesaid, and has not thereafter returned to cohabitation with the [husband] and her health has been damaged by the [husband's] treatment of her."

This petition was served on the husband in Freetown on Oct. 31, 1952. No appearance was entered by the husband, and on Jan. 23, 1953, application was made by the wife to DAVIES, J., for an expedited hearing as a witness from the Gold Coast, then in England, was intending to return home. The application was granted and the case came as an undefended suit before His Honour JUDGE GRANVILLE WHITE, sitting as a commissioner in divorce, who, on Feb. 9, 1953, granted a decree nisi in favour of the wife. Before the decree had been made absolute, the husband filed notice of motion for a re-hearing, in pursuance of the Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 36 (1). On June 23, 1953, the Divisional Court set aside the decree nisi and ordered a re-hearing. By his answer, dated June 23, 1953, the husband denied desertion, and said that the matters alleged in para. 10 had been litigated before and pronounced on by Mr. Commissioner BUSH JAMES, Q.C.; that the allegations in para. 14, para. 15 and para. 17 were identical in substance with the allegations in para. 16, para. 17 and para. 19, respectively, of the previous petition; and

"That the [wife] ought not to be admitted to plead desertion and is estopped from pleading that she had just cause as alleged in . . . her

petition on the ground that she is seeking to re-litigate matter which has already been determined in the judgment of Mr. Commissioner BUSH JAMES, Q.C. . . . The merits of the said pleas are *res judicata*."

This report deals with the preliminary issue of estoppel thus raised, as decided by WILLMER, J., on July 29, 1953.

*C. N. Shawcross, Q.C., and R. T. Barnard for the wife.*  
*Simon, Q.C., and Gorst, Q.C., for the husband.*

**WILLMER, J.:** This case arises out of a wife's petition for divorce on the ground of desertion. In its present form, the petition constitutes a plea of constructive desertion, for it is alleged that on a date in April, 1932, the wife by reason of the husband's conduct was driven out of the matrimonial home. I have to deal with two preliminary questions which have been raised on the threshold of the trial. On the one side, the husband contends that the wife is estopped *per rem judicatam* from raising the allegations which she now seeks to raise to show that the husband was guilty of desertion by driving her out. The reason for that contention is that there was a previous petition by the wife against the husband on the grounds of cruelty and adultery. That petition was heard by Mr. Commissioner BUSH JAMES, Q.C., in January, 1952, and was dismissed. It is contended on behalf of the husband that all the allegations which are now put forward in support of the plea of constructive desertion were either put forward and dismissed in the course of the previous proceedings, or else are such that they could, and ought to, have been put forward as part of the case which was then presented. On those grounds, it is urged that the wife ought not to be allowed to litigate again what amounts to substantially the same case as she sought to put forward on the previous occasion. On the other hand, the wife asks leave to amend her petition by including an alternative plea of simple desertion on a date in April, 1930. It is not, nor I think can it be, suggested, that such a plea would be barred by any estoppel arising out of anything decided in the previous case; but it is urged on behalf of the husband that, if I accede to the husband's application and refuse to allow the wife to put forward her allegations of constructive desertion, I ought not, especially at this very late stage, to allow her to make such a radical amendment of her case. On the other hand, if I allow all, or some, at any rate, of the wife's allegations of constructive desertion to stand, then, as I understood counsel for the husband, it is conceded that it would be difficult to resist the wife's application to amend. It was quite properly pointed out on behalf of the wife that this is an unfortunate way of dealing with an application of this sort. The proper way to deal with it would have been to apply in chambers before trial for an order striking out the offending part, or parts, of the petition, so as to get these questions decided without waiting for the trial, and without incurring the expense of collecting the witnesses and making all the other preparations for trial. However, that course was not taken and, unfortunate as it may be that it was not, I do not think it affects the merits of the application; it only goes to the question of costs. I think it remains true to say that, if the wife is estopped by reason of the judgment in the previous proceedings, it would clearly be wrong for me to allow the present suit to proceed.

I think it will be convenient if I state my decision on these difficult questions straight away, and then proceed to give the reasons which have guided me to that decision. On the main question I have come to the conclusion that the wife is estopped *per rem judicatam* from raising any of the allegations in the petition which go to support her plea of constructive desertion. That, as I

see it, involves para. 9 to para. 15 of the petition, both inclusive, and also para. 17 and para. 18. It does not, however, so far as I can see, touch para. 16, which alleges that in April, 1930, the husband refused to stay in the same house as the wife and left forthwith to find alternative accommodation. I cannot see that anything was decided in the previous proceedings which would involve any estoppel against the wife in raising that allegation. That is an allegation of a physical separation induced by the act of the husband in April, 1930, and it leads me at once to the amendment asked for by the wife, namely, the amendment to raise the allegation of simple desertion in April, 1930. That corresponds with the allegation in para. 16 of the petition, and as I cannot see that there is any estoppel against that allegation it seems to me that I ought to allow leave to amend in order to allege a simple desertion in April, 1930.

Now for the reasons which have led me to that conclusion. [HIS LORDSHIP stated the facts and continued:] I will endeavour to summarise the objections taken by the husband to the allegations now made. Paragraph 10 and para. 11, which raise allegations of an association between the husband and his half-sister, L.B.T., which, it is said, prompted suspicions in the mind of the wife, are objected to on the ground that it is no longer open to the wife to allege that she had any reasonable grounds for suspicion, having regard to the finding of the learned commissioner that the association complained of was not in fact a guilty association. On that point, the husband relies on the decision of the Court of Appeal in *Allen v. Allen* (1), which made it clear that, once the court has decided that a charge of adultery has not been proved, it is no longer open to the complaining party to say that he or she had reasonable ground for believing in such adultery. Paragraph 14, para. 15 and para. 17 raise allegations of threats of violence or of actual assault, and it is complained by the husband that they are mere repetitions of allegations made in the previous petition and expressly dealt with by the learned commissioner in his judgment, whereby he found that the allegations made were not proved. He came to the conclusion that nothing which the husband did in the way of threats or assault amounted to cruelty, and, in those circumstances, it is said that the same allegations cannot now be raised in support of a plea of constructive desertion. In support of that contention, I was referred to the decision of the Court of Appeal in *Pike v. Pike* (2), and particularly to the remarks of Hodson, L.J., and DENNING, L.J. In that case, an attempt was made to set up a case of constructive desertion by alleging acts which, if they were anything at all, were acts of cruelty, and the Court of Appeal decided that a party desiring to put forward such a case must charge cruelty. It will be sufficient if I read two extracts. HODSON, L.J., said:

"I want to make it as clear as I can that when the case sought to be made is in the nature of a case of cruelty, it is not possible to build up a case of constructive desertion by what is really a case of unproved cruelty. That, of course, does not cover the whole area of constructive desertion, for grave and weighty matters might be alleged which are quite different in kind and quite as serious, if not more serious, than cruelty."

Pausing there, it is said that what is there described by HODSON, L.J., is exactly what the wife is trying to do in this case, that is to say, she is trying to build up a case of constructive desertion by what is really a case of unproved cruelty. DENNING, L.J., said:

(1) 115 J.P. 229; [1951] 1 All E.R. 724.

(2) [1953] 1 All E.R. 232.



"In the circumstances of this case, the husband's conduct was either cruelty or it was not. It was not something different from cruelty. For the wife to justify her refusal to return, the only thing she could rely on would be the husband's cruelty, and in such a case cruelty must be pleaded and proved."

The observations of DENNING, L.J., were developed and explained by him in *Timmins v. Timmins* (1), when he said:

"We were referred to *Pike v. Pike* (2), and, in view of some comments made on it by DAVIES, J., in *Dixon v. Dixon* (3), I think I ought to explain some of the things I there said. In considering whether one party has good cause for leaving the other, much depends on whether the conduct complained of is of a 'grave and weighty' character or not. Conduct which is of a grave and weighty character may sometimes fall short of cruelty because it lacks the element of injury to health: as in *Russell v. Russell* (4) and *Edwards v. Edwards* (5); or because it lacks the element of intent to injure (as in the case of drunkenness or association with other women); but, nevertheless, it may give good cause for leaving, as the cases which I have cited earlier amply show. On the other hand, conduct which is not 'of a grave and weighty character', and is for that reason not cruelty, does not give good cause for leaving: see *Yeatman v. Yeatman* (6). It is conduct of that kind to which I referred in *Pike v. Pike* (2) when I said that conduct 'less than cruelty' does not justify a spouse in leaving. In the present case, the conduct of the husband was, I think, of a grave and weighty character, and the only reason why it was not cruelty was because there was no intent to injure. It comes, therefore, within the earlier cases to which I referred."

To that quotation I would add that in the present case it is suggested that the conduct complained of comes within the latter class referred to by DENNING, L.J., that is to say, in the present case it is said that the acts relied on by the wife were either acts of cruelty or else they were not grave and weighty matters at all. That being so, since the learned commissioner decided they were not acts of cruelty, they cannot be relied on as grave and weighty matters justifying the allegation of constructive desertion.

I come next to para. 9, para. 12 and para. 13. These relate to matters which appear not to have been specifically raised in the previous proceedings, but it is argued that all the matters alleged could, if true, have been raised in support of the charge of cruelty then made. That being so, it is contended that the court ought not now to entertain them, especially having regard to the general principles relating to estoppel which have been laid down in the decided cases. The locus classicus to which I was referred in this connection is *Hoystead v. Taxation Comr.* (7). I need not refer to the facts of that case which have no relation to those of the present case, but, in giving the judgment of the Privy Council, LORD SHAW stated the principle in the following oft-quoted words:

"It is seen from this citation of authority that if in any court of competent jurisdiction a decision is reached, a party is estopped from questioning it in a new legal proceeding. But the principle also extends to any

(1) [1953] 2 All E.R. 187.

(2) [1953] 1 All E.R. 232.

(3) [1953] 1 All E.R. 910; [1953] P. 103.

(4) [1895] P. 315; *affd.* H.L., 61 J.P. 771; [1897] A.C. 395.

(5) 113 J.P. 383; [1949] 2 All E.R. 145; [1950] P. 8.

(6) (1868), L.R. 1 P. & D. 489.

(7) [1926] A.C. 155.

point, whether of assumption or admission, which was in substance the ratio of and fundamental to the decision. The rule on this subject was set forth in the leading case of *Henderson v. Henderson* (1) by WIGRAM, V.-C., as follows: 'I believe I state the rule of the court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.' This authority has been frequently referred to and followed, and is settled law."

On the principles there stated, it is contended by the husband that these allegations in para. 9, para. 12 and para. 13 of the present petition, although not raised in the previous petition, nevertheless ought not to be allowed to be raised now.

On behalf of the wife it was contended in the first place that in relation to questions of estoppel the principles applied in this court differ materially from those applied in the ordinary civil courts. They differ, it is said, because of the overriding interest which the public has in proceedings in this court, particularly in proceedings which raise questions of status. No one will desire to quarrel with the statement that this court is concerned, as no ordinary civil court is concerned, with the public interest. It is argued that for that reason the ordinary rules of estoppel *per rem judicatam* do not apply here. In support of that contention, I was referred to some remarks of LANGTON, J., in *Winter v. Winter* (2). That was a case of an application for re-hearing by a husband, who had allowed an undefended petition by his wife to go through and then changed his mind about it. LANGTON, J., sitting in the Divisional Court, made it clear that the husband personally had no merits whatsoever. The Divisional Court, nevertheless, made an order for a re-hearing of the case, largely because they held that they were concerned, not only with the interests of the unmeritorious husband, but also with the public interest of ensuring that his case was properly investigated and that the wife did not obtain relief to which she was not properly entitled merely because of the absence of the husband.

The facts of *Hudson v. Hudson* (3) were more like those of the present case. That was a case in which the question was raised whether a husband, against whom a justices' order had been made on the ground of persistent cruelty, was estopped by that order from contesting the same allegations of cruelty when brought in this court in the course of a petition for divorce. It was held that there was no estoppel, notwithstanding the fact that the justices' order had been the subject of an unsuccessful appeal to the

(1) (1843), 3 Hare, 100.

(2) [1942] 2 All E.R. 390; [1942] P. 151.

(3) [1948] 1 All E.R. 773; [1948] P. 292.

Divisional Court who had expressly affirmed it. The decision, I think, is conveniently summed up by the second sentence of the headnote ([1948] P. 293) which says:

"In the Divorce Court the matter is not concluded per rem judicatum; and no doctrine of estoppel can operate against a party so as to abrogate the statutory duty of the court to inquire into the truth of a petition which is properly before it."

From that it is argued that the public interest prevents me from striking out, on the ground of estoppel, these paragraphs of the petition which are now objected to. I think that that argument rests on a misapprehension, and on a failure to distinguish between an estoppel as against a party charged with an offence and an estoppel as against a party putting forward a charge against the opposite party. It is one thing to say that the husband is not estopped from denying charges made by the wife, i.e., that the wife cannot in this court get relief simply because the husband is estopped from denying the charges. In that case the public interest, no doubt, does intervene to see that relief is not improperly obtained by a petitioner merely through some technical rule. But it is quite another thing to say that a petitioner, who is, if I may use the expression, the aggressor, the party bringing the charges, is entitled to persist in repeating allegations which have already been the subject of previous proceedings and have already been determined against him or her, and to do this merely for the purpose of obtaining relief for himself or herself. In such circumstances, as I see it, no interest of the public is infringed by saying that the petitioner is estopped per rem judicatum from repeating allegations that have previously been the subject of judicial determination. On the contrary, there is abundant authority for the proposition that in such cases the doctrine of estoppel applies with its full force in this as in any other court. I do not propose to refer in detail to the wealth of authority on this subject; most of the cases are collected in *RAYDEN ON DIVORCE*, 6th ed., p. 185; and the text, which states the law, as far as I can see, in an unexceptionable way, reads (*ibid.*, p. 184):

"Charges which have been unsuccessfully put forward and disposed of in one suit, cannot be repeated in a second between the same parties; for not only does the common law doctrine of estoppel apply, but, since in matrimonial causes a wife usually brings her suit at the expense of her husband, a repetition of charges would act as a peculiar hardship. The rule applies not only to the actual point of decision in the previous case, but also to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

I refer to a good example in *Finney v. Finney* (1), which has been approved in *Harriman v. Harriman* (2), and in *Winnan v. Winnan* (3). In those circumstances I do not think there is any merit in the first objection which the wife takes, and I hold that the ordinary rules as to estoppel per rem judicatum apply in relation to the allegations contained in this petition.

The next objection taken is that, notwithstanding that the rules of estoppel may apply, nevertheless there is authority against holding that, where there has been a determination with regard to allegations of cruelty, the petitioner

(1) (1868), L.R. 1 P. & D. 483.

(2) 73 J.P. 193; [1909] P. 123.

(3) [1948] 2 All E.R. 862; [1949] P. 174.

is necessarily estopped from raising the same allegations again in support of a plea of constructive desertion. On this aspect of the case it seems to me the wife has a more formidable argument. I was referred in the first instance to the recent decision of DAVIES, J., in *Dixon v. Dixon* (1). That was a case which came before the learned judge in chambers on an application to strike out from a petition a plea of constructive desertion on the ground that the allegations put forward in support of it were the same allegations as had been the subject of an unsuccessful petition for cruelty. In other words, on the face of it, the problem before the learned judge in that case was precisely the same as the problem before me now. The difference is that there the learned judge was dealing with the application at the proper time, viz., on a summons in chambers before the trial, whereas I am asked to deal with it at the trial. The summons was adjourned into court, and we, therefore, have the benefit of a report of the judgment. DAVIES, J., in that case felt himself unable to accede to the application, and, consequently, refused to strike out the offending paragraphs. I was invited by the wife to follow the decision of DAVIES, J., in that case, but, for reasons which I will try to explain, it seems to me that the circumstances in *Dixon v. Dixon* (1) are distinguishable in material particulars from those of the present case. One of the difficulties which DAVIES, J., appears to have felt, and to which he gave expression in the course of his judgment, was the difficulty of reconciling what was said in *Pike v. Pike* (2), in the passages to which I have already referred, with the decision (also of the Court of Appeal) in *Edwards v. Edwards* (3). The other circumstance which caused difficulty, and which, I think, was one of the main reasons for his decision, was the fact that in that case the judgment of the learned commissioner who had tried the original petition for cruelty was extremely brief; it did not deal in detail with all the various allegations put forward, and did not in the least make it clear what exactly the learned commissioner was deciding with regard to the various allegations. In those circumstances DAVIES, J., although, I think, obviously feeling sympathy for the application, held that it was impossible to take the drastic course of striking out the allegations in limine, but that the case must be allowed to go to trial. This case which is before me is somewhat different. For here the judgment of the learned commissioner in the previous petition for cruelty is very full and deals in detail with the various allegations that were raised. In particular, the judgment deals specifically with the allegations as to threats and assaults which are repeated in the present petition. So I do not share the difficulty of DAVIES, J., of not knowing what the learned commissioner in the previous proceedings really decided in relation to the allegations now made. Another matter in respect of which, it seems to me, I have the advantage of DAVIES, J., is that the difficulty of understanding what was meant by the Court of Appeal in *Pike v. Pike* (2) does not now persist, for since the decision of DAVIES, J., in *Dixon v. Dixon* (1) *Timmins v. Timmins* (4), to which I have already referred, has been before the Court of Appeal, and I have had the benefit of the explanation given in *Timmins v. Timmins* (4) of what had previously been said in *Pike v. Pike* (2). It may be that if DAVIES, J., had had the advantage, which I have had, of reading what was said in *Timmins v. Timmins* (4), he might have come to a different conclusion. I do not know, but at any rate, in view of what was there said in the passage to which I have already referred, it appears to me that in relation to these allegations

(1) [1953] 1 All E.R. 910; [1953] P. 103.

(2) [1953] 1 All E.R. 232.

(3) 113 J.P. 383; [1949] 2 All E.R. 145; [1950] P. 8.

(4) [1953] 2 All E.R. 187.



of violence or threats of violence the principle applies that either they were acts of cruelty, or, if they were not acts of cruelty, they were not "grave and weighty" matters at all. They cannot be put forward as "grave and weighty" matters other than cruelty on the ground, for instance, that they were not calculated to injure health or did not involve any intent to injure. By their very nature they either come within the class of acts calculated to injure health or intended to injure, or else they do not amount to anything at all; and if they do not amount to anything at all (which, as I see it, is the effect of the judgment of the learned commissioner), then they cannot be relied on as "grave and weighty matters" to support a charge of constructive desertion. At any rate, having the advantage of the decision in *Timmins v. Timmins* (1), and bearing in mind the great difference between the judgment which is said to raise the estoppel in this case and that which was before DAVIES, J., in *Dixon v. Dixon* (2), I do not think I can hold myself bound by the decision in *Dixon v. Dixon* (2).

Another authority strongly relied upon on behalf of the wife was *Foster v. Foster* (3). That was a case in which there had been two summonses by the wife before different benches of justices. There was an earlier summons before one bench of justices on the ground of persistent cruelty, which the justices dismissed. There was a later summons, which came before a different bench, on the ground of constructive desertion arising partly out of the same circumstances as the previous summons for cruelty, and in that second case, the second bench of justices found in favour of the wife. The question was then taken to the Divisional Court on appeal from the decision of the second bench of justices. The Divisional Court thus had to deal with a case where allegations, which had been the subject of a previous summons for cruelty, were again used to support a summons based on constructive desertion. It was a case about which the Divisional Court clearly felt difficulty. I notice from the dates given at the head of the report that it appears to have occupied the attention of the court for three days. Eventually the Divisional Court came to the conclusion that they could not interfere with the decision of the second bench of justices. There was in that case, in addition to the matters put forward as allegations of cruelty in the earlier case, evidence of certain other acts said to have been done by the husband subsequent to the date of the acts relied on in the first proceedings. The problem before the Divisional Court was not, of course, the same as that which I have to deal with here, viz., whether a party is to be allowed to make the allegations at all. There the allegations had already been made, and evidence given in support of them, in the course of the proceedings before the justices. The problem before the Divisional Court was whether there was admissible evidence by which the decision of the justices, the subject of the appeal, could be supported. Their decision was that there was enough, I think I can add just enough, evidence to support the decision of the justices. I think it is clear from the report that in coming to that decision LORD MERRIMAN, P., and COLLINGWOOD, J., were impressed by the fact that, in addition to the allegations which had been the subject of the previous proceedings for cruelty, there were other allegations of subsequent behaviour on the part of the husband, which were capable of supporting a charge of constructive desertion. If that is right, then clearly *Foster v. Foster* (3) is distinguishable from the case which I have to decide now, quite apart, of

(1) [1953] 2 All E.R. 187.

(2) [1953] 1 All E.R. 910; [1953] P. 103.

(3) 117 J.P. 377; [1953] 2 All E.R. 518.

course, from the obvious distinction to which I have already referred, viz., that the problem to be solved by the Divisional Court was not the same as that which I have to deal with here.

In the result, I hold that so far as this petition raises the same allegations as those put forward in the previous petition for cruelty the wife is estopped from reiterating those allegations in support of her plea of constructive desertion. That decision governs para. 14, para. 15 and para. 17, which, as I pointed out, are paragraphs reiterating matters which formed the subject of specific allegations and specific findings in the previous case. With regard to para. 9, para. 12 and para. 13, which raise matters not specifically raised in the previous proceedings, it is clear to me that these allegations are all allegations which could well have been made as part of the cruelty case which was then sought to be set up; indeed, one could go further, and say, from experience of this court, that each of them is of the type commonly raised in almost every cruelty case that comes before this court. In those circumstances, it appears to me that every word that was said in *Hoystead v. Taxation Comr.* (1), in the passage to which I have already referred, applies with its full force. In my judgment, the wife ought not now to be allowed to raise these allegations, which could have been raised as part of her case of cruelty if they are allegations of substance. With regard to para. 10 and para. 11 of the petition, as I have said, the learned commissioner found that the association between the husband and his half-sister was not an adulterous association. Actually he went further than that, because in the discussion which followed the conclusion of his judgment he said:

"I do not think these charges of incestuous adultery should ever have been brought. I think they are wicked."

That is a strong statement by the learned commissioner who tried the case. Having regard to his finding on those charges of adultery, it is no longer open in law for the wife to allege that she has reasonable cause to suspect the husband's association with the woman named. That is the result of *Allen v. Allen* (2), to which I have already referred. At no time, therefore, subsequent to January, 1952, when the learned commissioner pronounced his judgment, could the wife rely on that suspicion in support of her plea of constructive desertion. The importance is that this petition, as I have said, was not presented until October, 1952, and, as is well-known, the desertion complained of in a petition for divorce must cover the three years immediately preceding the presentation of the petition. Having regard to the decision of the learned commissioner in January, 1952, it appears to me that from that time onwards it was impossible for the wife to rely in support of her allegation of constructive desertion on the suspicion which she says she had about her husband's relationship with the woman named. In those circumstances I do not think it is open to the wife now to complain, as part of her case of constructive desertion, that she suspected that association.

That leaves only para. 8 and para. 16. Paragraph 8 is the subject of the application for amendment to which I have already referred, and I venture to suggest to counsel for the wife that, perhaps, para. 16 requires amendment as well. But, as I said at the outset of this judgment, I cannot see that the wife is in any way estopped, by reason of any finding in the previous proceedings, from alleging that the husband left her in April, 1930. No such allegation was put forward as part of the charge of cruelty which was investigated in

(1) [1926] A.C. 155.

(2) 115 J.P. 229; [1951] 1 All E.R. 724.

the previous proceedings, nor, so far as I know, is it in any way connected with the charge of adultery which was then made. I say that, notwithstanding the fact that in para. 16 the name of the woman named is actually referred to, but it is not referred to in connection with any charge of, or suspicion of, adultery. I can see no ground, therefore, on which I can fairly say that para. 16 ought to be struck out. If that paragraph is to remain, then it seems to me that in order that the pleadings in the case should bear some relation to that which it is desired to prove by evidence, I ought to allow the amendment sought for the purpose of alleging simple desertion in April, 1930. I have not said a word so far on the subject of delay, but I cannot help advert to the fact that the act of desertion, which it is now desired to allege, is said to have happened twenty-three years ago, and this is not the first opportunity which the wife has had of bringing it forward. It is true that she could not proceed in this country until 1949, but unless I am told I am wrong I should assume she could have proceeded a good deal before that in her own country. In those circumstances it is obvious that the question of delay must arise. I have not dealt with it in what I have said so far, because it seems to me that it comes properly at a later stage of the case; it is one of the things about which the wife will clearly have to be questioned, if the case goes on and she has to give her evidence, and in the end it may be that I shall have to consider whether the delay has been such that, in my discretion, I ought to refuse relief.

[HIS LORDSHIP then heard the evidence and, on July 31, 1953, dismissed the wife's petition.]

Solicitors: *Sidney Franks* (for the wife); *How, Davey & Lewis* (for the husband).  
G.F.L.B.

#### PRACTICE NOTE

#### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SELLERS AND HAVERS, JJ.)

October 7, 1953

R. A. H. (TRANSPORTERS), LTD. v. EDGAR

*Case Stated (by Justices)—Form—Magistrates' Courts (Forms) Rules, 1952 (S.I., 1952, No. 2191), Form No. 119.*

**LORD GODDARD, C.J.** (after the court had dismissed the appeal): I am not referring to the drafting of the Case here, but I do want the attention of practitioners and magistrates' clerks directed to the fact that the form of Case Stated is now prescribed by Form No. 119 of the Magistrates' Courts (Forms) Rules, 1952. I have been oppressed for a long time with the unnecessary recitals which are always put into Cases, by which we are told that some person is dissatisfied with the justices' decision and are referred to the provisions of statutes and so forth. Therefore, I have settled a form in which Cases should be stated, which has been accepted by the Rules Making Committee, and will be found to omit a great deal of the unnecessary recitals to which I have referred, consequently reducing the costs. I hope that practitioners and magistrates' clerks will remember that there is this form now prescribed, and will use it.

T.R.F.B.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SELLERS AND HAVERS, JJ.)

Oct. 6, 1953

## SOUTHGATE CORPORATION v. PARK ESTATES (SOUTHGATE) LTD.

*Private Street Works—Objection by frontagers—Works alleged to be “unreasonable”—Works premature—Jurisdiction of magistrates and quarter sessions—Private Street Works Act, 1892 (55 and 56 Vict. c. 57), s. 7 (d).*

By s. 7 of the Private Street Works Act, 1892: “. . . any owner of any premises shown in a provisional apportionment as liable to be charged with any part of the expenses of executing the [private street] works may . . . object to the proposals . . . on any of the following grounds . . . (d) that the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive . . .”.

The word “unreasonable” in the aforementioned section is a word of very wide import, and is not to be construed in a narrow or restricted sense. In considering, therefore, whether a scheme is “unreasonable”, justices, or quarter sessions on an appeal from justices, are entitled to have regard to the scheme as a whole and to consider whether it is reasonable that the proposed works should be carried out at all, or carried out at a particular time, and they are, therefore, entitled to hold that proposed works are unreasonable because they are, in their view, premature.

*Mansfield Corporation v. Butterworth (1898) (62 J.P. 500) applied.*

## CASE STATED BY MIDDLESEX QUARTER SESSIONS.

At Middlesex Quarter Sessions sitting at the Guildhall, Westminster, on July 29, 1952, Park Estates (Southgate) Ltd. (“the company”) appealed against the dismissal of all objections made by them under the Private Street Works Act, 1892, s. 7 (d), in respect of private street works to be done in Seafield Road in the borough of Southgate, which was heard and determined by a court of summary jurisdiction sitting at Tottenham on May 2, 1952. It was proved or admitted that on July 31, 1951, Southgate Corporation (“the corporation”) resolved to execute certain private street works in Seafield Road pursuant to s. 6 of the Act. On Nov. 27, 1951, the corporation resolved to approve the specification of the works, together with the plans, sections, estimate of probable expenses and the provisional apportionment. They complied with s. 6 (3) of the Act. The company were the owners (as defined in s. 5 of the Act) of premises shown in the provisional apportionment as liable to be charged with part of the expenses of executing the works. They were also the owners of vacant land on the same site, on which they desired to build houses. This vacant land had been zoned in the draft development plan for the county of Middlesex as a permanent open space, subject to compulsory purchase within ten years. If the company's objection to this draft plan were not successful, the corporation would, in due course, purchase the vacant land at its existing value. Seafield Road had been a private street since 1934, the approximate date when the company completed building some of the houses. The approximate cost of making up the road, which the corporation proposed to do by putting three inches of tar macadam on a basis of hard core, the existing surface of the road being retained insofar as it provided this basis, would have been £6,000, of which the company would have been liable to pay about £3,000. On Jan. 22, 1952, the company objected to the corporation's proposals to execute the proposed works on the grounds that they were insufficient or unreasonable, or that the estimated expenses were excessive. On May 21, 1952, the company applied to the corporation, pursuant to the provisions of Part III of the Town and Country Planning Act, 1947, for permission to develop the vacant land by building houses on it. On June 24, 1952, the corporation, acting as agents



for the local planning authority, the county council of the administrative county of Middlesex, refused permission to develop the vacant land in accordance with the application. The company intended to appeal against this decision to the Minister of Housing and Local Government. The building operations, which the company proposed to carry out if the appeal was allowed, would have necessitated the cutting into the road to lay on the gas, electricity and water services, and the heavy traffic, which would have been necessitated for a substantial period of time by those building operations, would have inevitably churned up the proposed new surface of the road, with the result that the £6,000 spent on the making up of the street would have been wholly, or to a large extent, wasted.

It was contended on behalf of the corporation that, in considering an objection under s. 7 (d) of the Act of 1892 that the works were unreasonable, the justices were not entitled to consider whether it was reasonable that the works should be executed at all, and the possibility of damage to the road as a result of the development proposed by the company was not a matter to be taken into consideration by the justices in determining such an objection. Whether or not private street works should be carried out in the road was a matter solely within the discretion of the corporation, and the justices had no power to adjudicate on the exercise of that discretion in considering an objection under s. 7 (d) of the Act. There was no evidence before the justices on which they could find that the corporation had exercised their discretion in respect of the making up of the road on any wrong principle. The works were not unreasonable within s. 7 (d) of the Act. It was contended on behalf of the company that the corporation's proposal to make up the road was premature, in that, in the event of the Minister allowing the company's appeal against the corporation's refusal to grant them permission to develop the vacant land, then the road, as made up, would have to be cut into to provide some or all of the various public utility services for the new houses on the land, and, further, having regard to the very light form of surface construction proposed, the road would be churned up by heavy vehicles used in the construction of the houses which the company proposed to build. The work was "insufficient" within the meaning of s. 7 (d) of the Act, in that the corporation proposed to adopt a very light form of surface construction for the road, which would suffer very serious damage from the continuous heavy traffic to which it would be subjected for a substantial period in the event of the Minister granting the company permission to develop the land. The corporation were not making a bona fide exercise of their powers under the Act of 1892 in requiring the company to pay approximately £3,000 towards making up the road on land now belonging to the respondents, which land they refused to allow the company to develop and which they would, in due course, compulsorily purchase if the Minister approved its zoning as a permanent open space, which zoning the corporation had originally recommended.

Quarter sessions allowed the company's appeal and ordered that the resolution, specifications, estimates and provisional apportionments, the subject of the appeal, be quashed, and the corporation now appealed.

*J. R. Willis and C. C. P. Hodson* for the corporation.

*Ackner* for the company.

**LORD GODDARD, C.J.:** This is a Case stated by Middlesex Quarter Sessions, and raises a rather difficult point under the Private Street Works Act, 1892, an Act which frequently does raise difficulties and has been the subject of a good many decisions in this court. [His Lordship stated the facts and continued:] The case came before this court originally in April, 1953, and the

position was this. Quarter sessions had allowed the appeal, so the work was stopped. By that time the company had heard that the Minister of Housing and Local Government had allowed their appeal, and, therefore, it was open to them to build, and they were proposing to build. It seemed to this court then that it would be rather absurd to hear this appeal and give a decision which might be completely academic because, if the building was going on, it was obvious that this work might easily be entirely thrown away, and work which would have to be done if the street became a street with houses on both sides would be very different from what was required when it contained only a few houses. We adjourned the case in the hope that there would be some settlement between the parties, but by a series of misfortunes the company's building work has not yet been started.

Section 7 of the Private Street Works Act, 1892, provides that the persons liable to contribute may object to the proposals "on any of the following grounds", and among them are: "(d) That the proposed works are insufficient or unreasonable, or that the estimated expenses are excessive". There are three disjunctive terms: "insufficient", "unreasonable", and "the expenses are excessive". Section 8 provides for a determination of the objections, which are to be heard by a court of summary jurisdiction, and by sub-s. (1):

"... The court may quash in whole or in part or may amend the resolution, plans, sections, estimates, and provisional apportionments, or any of them, on the application either of any objector or of the urban authority ..."

If the statute allows an objection on the ground that works are unreasonable, and if a court has to decide on the validity of that objection, that is to say, whether the objection is well founded, it seems to me that it follows from that that the court must consider whether the works are reasonable or not. The word "unreasonable" is a very wide word and is intended, I think, to give a very wide power to a court that has to decide whether an objection to the works is well founded or not.

Counsel for the corporation has contended that the statute, on its true construction, does not enable the justices, or, ex hypothesi, quarter sessions on appeal from the justices, to consider whether or not the works are, if I may put it so, desirable, or whether they should be done at one particular time or another. So far as the last objection is concerned, I do not think quarter sessions would have power to say: "We think these works are desirable, but they must be put off. We think they ought to start, not this week, but next week", or anything of that sort. But, in considering whether the works are reasonable or not, the real question is: Can the justices or quarter sessions say: "We have come to the conclusion on a review of all the circumstances that, at any rate for the present, there is no need to make up this road"? The contention of counsel for the corporation is that the cases have established that the justices have no power to upset what I call the original resolution, that is to say, the resolution of a council resolving that it is desirable that the work should be done. It has been held in *Sheffield Corp'n. v. Anderson* (1), that it is only the second resolution, that is to say, the resolution approving the specification and apportionment, which can be attacked, but it seems to me that, however that may be, if the justices give effect to the objection, the statute enables them to quash the second resolution, and that would, at any rate, put a stop to the proceedings for the time being. Whether there can be another resolution and another apportionment, and so forth, we have not to consider; we have to consider

(1) (1894), 64 L.J.M.C. 144.

whether the justices had power to give the decision they have given because, in their opinion, these works were premature.

In my opinion, this case has really been decided for us by *Mansfield Corpn. v. Butterworth* (1), and more especially by the judgment of WILLS, J. The court there had to take into account what was the meaning of s. 7, and he said this, dealing first with the word "insufficient":

"I think 'insufficient' means that the specified works are insufficient to carry out the purpose which is proposed to be effected by them; it does not mean that they are insufficient having regard to something which, if done, might make a better scheme for the neighbourhood in general; it does not enable the justices to take into consideration other things which are altogether outside the character of the works in respect of their sufficiency to produce the effect desired. The word 'insufficient', in my opinion, points exclusively to a comparison between that which is proposed to be done and the means of effecting it. The word 'unreasonable' has undoubtedly a wider meaning, and I think that it does give the justices jurisdiction to say whether, having regard to the scheme as a whole, it is reasonable or not that the proposed works should be done at all. That seems to follow from the decision of the Court of Appeal in *Sheffield Corpn. v. Anderson* (2), where the court held that a resolution approving plans for draining a street, the drainage of which the justices thought was already sufficiently provided for, might be quashed on the ground that it was unreasonable."

KENNEDY, J., who was the other member of the court, said:

"Now, the insufficiency meant by the Act must, in my view, mean the insufficiency of the proposed works to carry out the object for which they are proposed. The justices have held that the proposed works were unreasonable, not in respect of the street as a street which wanted paving, sewerage, and lighting, but because the scheme did not go further and say that the street should also be widened."

That case has stood for fifty-five years, and counsel has not been able to draw our attention to any case in which it has ever been questioned. Accordingly, we must take it that that case is binding on this court. It surely must follow that, if the court was right in saying that the justices could hold that the proposed work should not be done at all, they can say at any particular time: "This work is not required and is not to be done". That does not mean that the justices are saying that the work is never to be done, but that they consider that it is unreasonable to do the work at the present time, and when I say "at the present time", what the justices are saying is that the street, as a street (to use KENNEDY, J.'s words), does not require paving, sewerage, and lighting. It may in the future, one cannot say. It seems to me that, on the plain words used by both the learned judges in the *Mansfield* case (1), it follows that the justices have power to say: "You are asking us to decide on an objection that this work is unreasonable. We have come to the conclusion that it is unreasonable because we do not think it should be done now. We are not saying it should never be done, but not now".

The only two other cases to which our attention has been drawn are, first, *Chester Corpn. v. Briggs* (3), in which SALTER, J., at the end of his judgment said:

(1) 62 J.P. 500, 501; [1898] 2 Q.B. 274, 281, 283.

(2) (1894), 64 L.J.M.C. 144.

(3) 88 J.P. 1, 3; [1924] 1 K.B. 239, 247.

"In considering an objection under s. 7 (d) that the proposed works are unreasonable, the justices are entitled to consider, among other things, whether the proposed works are reasonable in the sense that it is reasonable that such work should be done at the frontagers' expense."

In the subsequent case of *Allen v. Hornchurch Urban District Council* (1), the court said that that was a dictum of one judge which was not supported by the other two judges, and so the court did not follow it and it must be regarded as overruled. But it was because of that dictum that the justices who decided *Allen v. Hornchurch Urban District Council* (1) came to the decision that the particular work would cast an unreasonable burden on the frontagers and, I suppose, it ought, therefore, to have been contributed to by the local authority, as they can, under s. 15. But that case does not, it seems to me, throw any doubt on the decision in the *Mansfield* case (2) because it really deals with a different point. It simply says that Parliament puts on the frontagers, the burden of paying for these improvements, and, therefore, it is not an objection to the carrying out of the improvement that the court may think it rather hard on the frontagers that they have to pay for some particular form of road. If the justices had found in the *Hornchurch* case (1) that the road was unreasonable—that it was unreasonable to put down a road of that sort or that the expense would be excessive—that would have given them ground within the *Mansfield* case (2) for quashing the resolution and setting aside the subsequent apportionment.

For these reasons, I think this court must consider itself bound by *Mansfield Corpn. v. Butterworth* (2). Therefore, quarter sessions were entitled to come to the decision they did, and this appeal fails.

**SELLERS, J.:** I agree. The power of the justices is derived from s. 7 (d) of the Private Street Works Act, 1892, and it depends, in this case, on the proper interpretation to be given to the word "unreasonable". My Lord has pointed out that that part of the Act, including, particularly, the word "unreasonable", was construed as far back as 1898, and, as my Lord has said, I do not think this court can place a different interpretation on it. If the interpretation given by WILLS and KENNEDY, J.J., in the *Mansfield* case (2) is right, then, on the facts before quarter sessions, they were amply justified in coming to the conclusion which they did.

**HAVERS, J.:** I agree with both the judgments which have been delivered. Quarter sessions held, on the facts of the particular case which was before them, which have been adequately stated by my Lord, that the proposals of the appellants were premature and on that ground were unreasonable. Few people, I think, having heard the facts which were before the justices, would doubt that the conclusion at which they arrived was a very practical and common-sense conclusion, but counsel for the appellants has contended before us that quarter sessions had no jurisdiction to come to the conclusion at which they arrived, and that the word "unreasonable" has to be construed in a somewhat narrow and restricted sense. Obviously, the word "unreasonable" is a word of very wide import, and I agree with my Lord that we are bound by the decision of this court in *Mansfield Corpn. v. Butterworth* (2). If that is so, accepting the interpretation that WILLS, J., put on the word "unreasonable"

(1) 102 J.P. 393; [1938] 2 K.B. 654; sub nom. *Hornchurch U.D.C. v. Allen*, [1938] 2 All E.R. 431.

(2) 62 J.P. 500, 501; [1898] 2 Q.B. 274, 281, 283.



in this section, it seems to me to follow that quarter sessions had jurisdiction to take the course they did.

*Appeal dismissed.*

Solicitors: *G. H. Taylor*, town clerk, Southgate (for the appellants); *Vincent & Vincent & Rawlinson & Son* (for the respondents).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SELLERS AND HAVERS, JJ.)

October 6, 1953

**R. v. GLAMORGANSHIRE JUSTICES. *Ex parte* NAGI KASHIM**

*Justices—Procedure—Retirement of clerk with justices—No question of law involved.*

On a point of law justices are entitled to the services of their clerk, and he may retire with them to advise them, but justices should not invite their clerk to retire with them when they are considering a question of fact, and, if so invited, the clerk should advise them that it would not be proper for him to retire with them.

Where, after the clerk had retired with justices to consider a question of law upon which they had adjudicated, the clerk again retired with them when they had only a question of fact to consider,

**HELD**, that the conviction of the defendant before the court must be quashed.

Dicta of LORD GODDARD, C.J., in *Reg. v. East Kerrier JJ. Ex p. Mundy* (1952) (116 J.P. 339); *Reg. v. Welshpool JJ. Ex p. Holley* (1953) (ante, p. 511) applied.

**APPLICATION for order of certiorari.**

At a magistrates' court at Barry an information was preferred against the applicant, Nagi Kashim, a café proprietor, on behalf of H.M. Customs and Excise, charging him with keeping 680 uncustomed American cigarettes.

According to the applicant's affidavit, the justices with their clerk retired to consider a point of law raised on behalf of the applicant, and the justices decided the point against him. The applicant then gave evidence in his own defence. In his closing address his counsel requested the justices not to ask their clerk to retire again with them, drawing their attention to the decision on this question in *Reg. v. East Kerrier Justices. Ex parte Mundy* (1). The justices then retired and the clerk retired with them. The applicant was anxious that the clerk should not retire with the justices as he was known to the clerk, having previously appeared before a bench at which the clerk was present. On returning to the court and having announced their decision to convict, the chairman of the justices stated that they were aware of the functions of the clerk and that he had in no way influenced them in coming to their decision. The applicant obtained leave to apply for an order of certiorari to quash the conviction.

*Rhys-Roberts* for the applicant.

*R. Geraint Rees* for the justices.

*J. P. Ashworth* for the Commissioners of Customs and Excise.

**LORD GODDARD, C.J.:** In the course of the hearing in this court of *Reg. v. East Kerrier JJ. Ex p. Mundy* (1) it emerged that the justices' clerk had retired with the justices when, apparently, the only question that was before the justices was a question of fact. This court came to the conclusion that the conviction in that case must be quashed, but not merely on the ground that the justices' clerk had gone into the room with the justices, because we

(1) 116 J.P. 339, 340; [1952] 2 All E.R. 144, 146; [1952] 2 Q.B. 719, 722.

did not think at that time that it had been made sufficiently clear that this court disapproved of the practice of justices' clerks so retiring with the justices. When, in my judgment, I had announced the decision of the court, I said:

"Another matter which I feel bound to mention is this. Although I cannot for the moment trace the authority, I think it has certainly been said more than once in this court that it is not right that the justices' clerk should retire with the justices. It has been said over and over again that the decision must be the decision of the justices, not the decision of the justices and their clerk, still less the decision of the clerk, and, if the clerk retires with the justices, people will inevitably form the conclusion that the justices' clerk may influence the justices, or may take some course which it is for the justices alone to take. The justices can always send for the clerk if they require advice on a point of law because that is what the clerk is there for, but it is not desirable, and it is not, I would say, regular, for a clerk to retire with justices as a matter of course at the time they are considering the facts. He should remain in the court until the justices either return into court or send for him. Whether we should have quashed the conviction on the ground that the justices' clerk retired with them (although I believe it has been done in one case), I need not say. But we think it is undesirable and we hope that in future justices' clerks will not retire with their bench, unless their advice is required."

In *Reg. v. Welshpool JJ. Ex p. Holley* (1), which, it is only fair to say, had not been reported when the present case came before the Barry justices, I was at some pains to explain the position, and I said:

"Justices will, I feel sure, recognise that it is their duty to obey a direction of this court not only in the letter but in the spirit, and that they are not to get round the direction which was given in the *East Kerrier* case (2) merely by pretending that they require the presence of their clerk to advise them when there is nothing but fact to be considered."

We did not mean, of course, in the *East Kerrier* case (2), that if a question of law were raised the clerk ought to stay in the court till the justices said: "Come out with us".

In the present case, at the end of the case for the prosecution, counsel for the defendant submitted that there was no case to answer in law. That, of course, raised a legal point, and the justices were entitled to tell their clerk to come out with them to give them his advice on that question of law. The question of law having been decided against the defendant, it remained for the defendant to try to satisfy the justices, if he could, he being charged with being in possession of uncustomed goods, that he was in possession of them innocently or that they were not, in fact, uncustomed. That was a pure question of fact. The justices then left the court and they took their clerk with them. All the justices have filed affidavits, and not one of them has suggested that there was any question on which they required the advice of their clerk. The justices cannot get round the direction this court gave in the *East Kerrier* case (2) merely by asking their clerk to go out with them when they do not require his assistance on any matter whatever—and they do not pretend in this case that they required his assistance. Therefore, they ought not to have asked him to go out, and when the clerk found there was nothing on which they required his assistance, he ought to have left the room to which the justices

(1) ante p. 513; [1953] 2 All E.R. 807, 809.

(2) 116 J.P. 339, 340; [1952] 2 All E.R. 144, 146; [1952] 2 Q.B. 719, 722.

had retired. It is as well that clerks and justices should understand that this court requires them to follow directions which this court has given from time to time. Ever since there have been justices of the peace in this country, they have been subject to the control of the Court of Queen's Bench (now the Queen's Bench Division of the High Court) and if justices, knowing quite well the directions this court has given, act contrary to them, this court will have no hesitation in sending their names to the Lord Chancellor calling attention to what has been done.

The direction given in the *East Kerrier* case (1), which the judges of the Queen's Bench Division, speaking generally, have approved, was given because the decision must be that of the bench, but, on a point of law, the bench are entitled to take the advice of their clerk. On a point of fact it is essential that the public should be able to see, and to understand, that the decision is that of the justices and of nobody else. One of the considerations which the court had in mind in the *East Kerrier* case (1) was the very thing that has happened in this case. The applicant has previous convictions in courts in which this very clerk has sat as clerk. I do not impute to the clerk any misconduct in the justices' room, but it is important to bear in mind that justice must not only be done but must be manifestly seen to be done. If it appears that there has been an opportunity for information to be given to the justices apart from that proved in open court, doubts may arise whether the trial has been fair.

I have no doubt that the right course for the court to take is to quash this conviction in order to show that this court is resolved that justices shall obey the directions which this court gives, and if they do not obey the directions in the spirit as well as in the letter, other consequences will follow. The order will go for certiorari to quash.

**SELLERS, J.:** I agree. I would only emphasise that it is the clerk's function to advise the justices as to his own powers as they have been defined by this court, and even if the justices do ask him to retire with them, if he is satisfied that the only matter for consideration is one of fact, he should indicate that to his justices.

**HAVERS, J.:** I entirely agree, and I have nothing to add.

*Order of certiorari.*

Solicitors: *D. B. Levinson & Co.*, agents for *F. P. Jones-Lloyd & Jones, Barry* (for the applicant); *Torr & Co.*, agents for *R. H. C. Rowlands*, County Prosecuting Solicitor, Glamorgan (for the justices); *Solicitor of Customs and Excise.*

T.R.F.B.

(1) 116 J.P. 339, 340; [1952] 2 All E.R. 144, 146; [1952] 2 Q.B. 719, 722.

PRACTICE DIRECTION.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J.)

Nov. 16, 1953

*Justices—Clerk—Presence in retiring room while justices consider decision.*

**LORD GODDARD, C.J.:** In three recent cases\* this court has had to consider the question when, and for what purposes, it is proper for a clerk to justices to accompany them when they retire to consider their decision, or to remain in their room while the case is under consideration. It is evident from letters received both by the Lord Chancellor and myself, and from correspondence in newspapers, that there is uncertainty in the minds of magistrates on this subject and, indeed, some degree of misunderstanding as to the effect of what was said in the cases to which I have referred. They are the cases concerning the East Kerrier justices (1), the Welshpool justices (2) and the Barry justices (3). I propose, therefore, to endeavour to clear up this matter, and have the authority of the Lord Chancellor to say that he concurs in the statement I am about to make, as do all the judges who were parties to the decisions I have mentioned.

There are two questions which arise in this connection. The first is: On what matters may magistrates consult their clerk? The second, and one of equal importance, is: In what manner should they consult him?

On the first question, it is clear that they may seek his advice on questions of law, or of mixed law and fact, and also on questions regarding the practice and procedure of the court. The latter are, indeed, questions of law. There are other matters on which justices may require the assistance of their clerk and on which they are entitled to ask his advice. They may, for instance, ask him for information of the sentences which have been imposed by their bench, or by neighbouring benches, in respect of similar offences to that which they are trying. It is, indeed, most desirable that penalties for such matters as obstruction by vehicles, lack of lights and other what may be called public order offences should have some degree of uniformity. Moreover, it would be proper for the clerk himself to call the justices' attention to the fact that a question of law does, or may, arise if they do not appear to be already aware of it. It would then be for them to consider whether they wanted his further advice on that question. In no circumstances, however, may justices consult their clerk as to the guilt or innocence of the accused, so far as it is simply a question of fact, but, if a question arises as to the construction of a statute or regulation, they may consult him on whether the facts found by them constitute an offence, because that would be a question of mixed law and fact. They may also properly ask the clerk to refresh their memory as to any matter of evidence which has been given. They can take with them, or send for, any note the clerk may have taken, and if there is anything in the note which needs elucidation, or if they think something has been omitted or wrongly taken down, it would be perfectly proper for them to consult him. They must not ask his opinion as to the sentence which they ought to impose, but they may, as I have said, ask for information as to the sentences imposed for comparable offences, and they most certainly may consult him on what penalties the law allows in any particular case if they already do not know it, and on any con-

\* (1) *Reg. v. East Kerrier JJ. Ex p. Mundy* (1952), 116 J.P. 339.

(2) *Reg. v. Welshpool JJ. Ex p. Holley*, ante p. 511.

(3) *Reg. v. Barry (Glamorgan) JJ. Ex p. Kashim*, ante, p. 546.



sequential matters that may follow on conviction. One obvious instance would be with regard to certain motoring offences, whether reasons which they are prepared to give can amount to special reasons for not disqualifying a driver according to the decision of this court on that subject. They may also want to know whether it is a case in which they can require sureties for good behaviour in addition to imposing a penalty.

As regards the manner in which justices may consult their clerk, the court, I think, made it clear in the *East Kerrier case* (1) that the decision of the court must be the decision of the justices, and not that of the justices and their clerk, and that, if the clerk retires with the justices as a matter of course, it is inevitable that the impression will be given that he may influence the justices as to the decision, or sentence, or both. A clerk should not retire with his justices as a matter of course, nor should they attempt to get round the decisions to which I have referred merely by asking him in every case to retire with them, or by pretending that they require his advice on a point of law. Subject to this, it is in the discretion of the justices to ask their clerk to retire with them if, in any particular case, it has become clear that they will need his advice. If, in the course of their deliberations, they find that they need him, they can send for him. On this matter I would stress one further point, and that is, that if the clerk does retire with the justices, or is sent for by them, he should return to his place in court as soon as he is released by the justices, leaving them to complete their deliberations in his absence and come back into court in their turn. I wish to add that the rulings this court has given on the subject derive from, and are really part of, the rule so often emphasised that justice must not only be done but must manifestly appear to be done, and, if justices bear that in mind, I feel sure they will have no difficulty in loyally following the decisions of this court.

I should add that the rulings of this court do not apply to justices when exercising jurisdiction in matrimonial cases as they are then subject to the directions and control of the Probate, Divorce and Admiralty Division. G.F.L.B.

(1) *Reg. v. East Kerrier JJ. Ex p. Mundy* (1952), 116 J.P. 339.

#### NOTE

#### PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

Oct. 13, 1953

#### PADLEY v. PADLEY

*Husband and Wife—Appeal—Notes of evidence and reasons—Need to supply before appeal set down—Matrimonial Causes Rules, 1950 (S.I., 1950, No. 1940), r. 71 (3).*

APPEAL by the husband from an order made by justices of the Nottingham Petty Sessional Division on Mar. 18, 1953, under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949. The justices found the husband guilty of desertion and of wilful neglect to provide reasonable maintenance for the wife and the infant child of the marriage, but not guilty of persistent cruelty to the wife.

*R. L. Bayne-Powell* (John Latey with him) for the husband.

*K. B. Campbell* for the wife.

**LORD MERRIMAN, P.:** The justices have expressed a hope that we would give them some guidance on a technical matter. The appeal was out of time, due, partly, to delay in obtaining the reasons of the justices for their decision. This, I gather, was because, through their clerk, they expressed the view that they would prefer to wait for the appeal to be set down and become effective before they went to the trouble of stating their reasons. They wish to know whether that was correct or not. I shall answer that question in two ways. Looked at from a strictly technical point of view, it was certainly wrong, because the Matrimonial Causes Rules, 1950, r. 71 (3), governing appeals from courts of summary jurisdiction under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, provides that, at the time of lodging the notice of motion stating the grounds of appeal, the appellant must file

" . . . two copies of the justices' clerk's notes of the evidence and two copies of the reasons of the justices for their decision."

That sub-rule cannot be complied with if justices withhold their reasons until the case is set down. But, apart from the question of a strict compliance with r. 71 (3), there is, in my opinion, a good reason for obtaining at the earliest possible moment from justices, not only the notes of the evidence, but also the reasons for their decision. It is a matter of common knowledge that some legal aid certifying committees, when asked to give a certificate to an appellant from a decision under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, prefer, in the first instance, to give a limited certificate to enable the appellant to take up the notes of evidence and the statement of reasons, so that the committee can then consider for themselves whether there is any likelihood of the appeal being successful. I am not laying down any rule that that ought to be done. Suffice it to say that many people take the view that it would be desirable if that practice were more frequently followed, and, of course, it could not be followed if justices were to refuse to give their reasons until the appeal had become effective. There is no provision in the Legal Aid (General) Regulations, 1950, whereby any costs can be recovered which have been incurred before the period covered by the certificate,\* and, therefore, if parties have to take up the notes and the statement of the justices' reasons at their own expense, it might conceivably result in a denial of justice.

**PEARCE, J.:** I agree. Quite apart from the requirement of the Matrimonial Causes Rules, 1950, r. 71 (3), it is not satisfactory to compel a would-be appellant to incur the expense of starting an appeal before he can obtain the notes and reasons, which alone will show him whether there is the faintest prospect of success. To do so would merely multiply the number of hopeless appeals, as one knows from experience that, once an appeal is launched, even if it later appears to have little hope of success, it tends to go forward of its own momentum. As so many appellants in this court have legal aid, that is a matter of which one must take particular note.

[The court then dealt with the appeal on its merits.]

Solicitors: *Gibson & Weldon*, agents for *Crockford & Anderson*, Nottingham (for the husband); *S. C. Elphick*, agent for *Clayton, Ellis & Massey*, Nottingham (for the wife). G.F.L.B.

\* See *Hatch v. Hatch*, [1951] W.N. 235; 27 Digest, Replacement, 729, 6955.

PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

Oct. 6, 7, 1953

KINNANE v. KINNANE

*Husband and Wife—Maintenance—Wilful neglect to maintain child—Validity of order in favour of wife.*

The parties were married in 1940 and there was one child of the marriage. After a separation, the parties came together again in May, 1952, the husband then agreeing to pay the wife £6 a week for housekeeping and maintenance. Later, that sum was reduced to £3 a week. On Jan. 3, 1953, the husband left the matrimonial home and after that date he paid the wife £1 a week as maintenance for the child. The wife issued summonses under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her and wilfully neglected to maintain her. On Feb. 11, 1953, the justices dismissed the summons for desertion on the ground that the husband's departure was not against the will of the wife "as she had stated she had not wanted him to return [in May, 1952], but had given him a chance, and she did not wish him to return now [at the hearing]". They found the husband guilty of wilful neglect to maintain and ordered him to pay the wife £3 10s. a week, being £2 for herself and £1 10s. in respect of the child. The husband appealed, contending that, in effect, the justices found the separation to have been consensual, and that, since there was no agreement, express or implied, that he should continue to maintain his wife, the justices' finding of wilful neglect to maintain her could not be supported. The wife cross-appealed against the dismissal of her summons for desertion.

HELD: (i) on the facts the justices were entitled to find the husband guilty of wilful neglect to maintain the child; an order for the maintenance of the child was in law an order in favour of the wife; and, therefore, the justices had power to make the order which they made for the maintenance of the wife.

(ii) in any event, even assuming that the separation on Jan. 3, 1953, was consensual, on the facts it was agreed to on the implied undertaking that the husband's liability to support the wife and child continued; and

(iii) on the facts the husband had deserted the wife.

APPEAL by the husband and CROSS-APPEAL by the wife against a decision of Luton borough justices dated Feb. 11, 1953.

The parties were married in October, 1940, and in 1943 the child of the marriage was born. Later, the parties separated, but they were reconciled in May, 1952, the husband agreeing to pay the wife £6 a week for housekeeping and as maintenance. Subsequently that amount was reduced to £3 a week. On Jan. 3, 1953, the husband left the wife. He was then £15 in arrears of the weekly payments to her and after that date he paid her only £1 a week as maintenance in respect of the child. The wife issued summonses under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her and had wilfully neglected to provide her with reasonable maintenance. The justices dismissed the summons for desertion, but found that the husband had wilfully neglected to provide the wife with reasonable maintenance and ordered him to pay her the sum of £3 10s. a week, being £2 for the wife and £1 10s. for the child, the custody of whom they gave to the wife. The husband appealed against the finding of the justices on the second summons, and the wife, having obtained leave for an extension of time, cross-appealed against the dismissal of the summons for desertion.

D. R. Ellison for the husband.

T. H. K. Berry for the wife.

LORD MERRIMAN, P., stated the facts and continued; The justices

dismissed the charge of desertion on the ground that the parting was not against the will of the wife, but was, in effect, a consensual separation. From that it is argued by the husband that not only can there be no order on the ground of desertion, as, indeed, there is not, but also that the order on the ground of wilful neglect to maintain necessarily fails because, if the separation was consensual, there is no finding that there was any agreement, express or implied, that it was on the basis that the husband would continue to maintain his wife, so that the order of the justices is bad, except as to the award of £1 10s. a week in respect of maintenance for the child. I do not think there is any difficulty about the law. The difficulty in this case is to see what is the proper inference from facts which are, to a large extent, not in dispute. But I think it is necessary at the outset to remind ourselves once more of the underlying basis of the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, and that is, in a sentence, that it is the wife who is the applicant and that it is in her favour, and in that of nobody but her, that whichever of the permitted orders the court decides to make is made\*. We talk loosely of an order for the children. It is not an order for the children. Although under the Summary Jurisdiction (Married Women) Act, 1895, s. 5 (b), the custody of the children might be awarded to the wife, there was nothing in that Act about any support for the children at all. It was not until the Married Women (Maintenance) Act, 1920, that it was provided by s. 1 (1) that, in addition to any of the other orders which might be made for the wife, a sum, then limited to 10s. a week as a maximum, might be ordered to be paid to her in respect of any child of whom she was given the custody. That amount is now 30s., and the wife's maximum amount is £5 instead of £2, but, as I read the amending Acts, no alteration whatever has been made in the fundamental conception that whatever order is made is an order in the wife's favour. A separation order can theoretically be made if any of her complaints is proved, although, as has been laid down by the Court of Appeal, justices should not make a separation order unless, in the exercise of their discretion, they consider that it is necessary for the protection of the wife. An order for the custody of the children is an order in favour of the wife. Justices have no power under the Act of 1895 to order custody of the children to the husband, and any sum awarded for the maintenance of the wife, and any sum ordered to be paid to the wife for the support of the children is, as it always has been, an order for the wife. Speaking generally, any of these orders, as I read the code, can only be made if it is established that one of the complaints made by the wife under the code is found to be proved. In other words, I reject the argument that an order cannot be made in favour of the wife for the maintenance of the wife unless it is founded on wilful refusal to provide reasonable maintenance for her, or, put the other way, that, if the only finding is that there has been wilful neglect to provide reasonable maintenance for the infant children whom the husband is legally liable to maintain, no order for maintenance of the wife can be made. I do not think that is the law. It may be that the amount which a court thinks reasonable as an award in favour of a wife may depend on whether the neglect has been of the wife or of the children or both, but, in my opinion, the right to make an order is established when the justices are satisfied that any one of the complaints set out in the Act of 1895, s. 4, is proved.

That principle is important in this case. After the parting the husband sent

\* For the special circumstances in which a husband may be the applicant, see Licensing Act, 1902, s. 5 (2), the Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1 (3), and the Matrimonial Causes Act, 1937, s. 11 (2).



the wife only £1 a week as maintenance for the child. The justices have thought it right to quantify the reasonable amount to be paid to the wife in respect of the child as £1 10s. and it is admitted that the inference is that they did not think the amount sent by the husband, even for the maintenance of the child, was reasonable. Therefore, there has been neglect to pay reasonable maintenance in respect of the child whom he was legally liable to support. That being so, I should be prepared to hold that the whole order can be supported. If, now that the maximum amount which may be ordered to be paid to a wife is £5, the justices had chosen to say that they would order this wife to receive £3 10s. and had not apportioned that sum between wife and child, in my opinion, that order could not have been challenged. But I do not think we can decide this case solely on that narrow ground. This is one of those cases in which the question of the wife's right to support for herself is bound up with the question whether or not she has been deserted and I will examine the case from that point of view. It sounds a logical argument and one at first sight difficult to answer, that, as the justices have found there was no desertion because the wife was not unwilling that the husband should leave her, it, therefore, follows that the separation was consensual, and, there being no finding that there was any agreement, express or implied, to pay maintenance, therefore, she cannot recover under any head whatever—even though, as I have already said, it is admitted to be implicit in the justices' findings that there has been neglect to provide a reasonable amount in respect of the child.

On the assumption for the moment that the separation was consensual, I will deal with the question whether or not it was on the footing that the husband expressly or impliedly agreed to maintain his wife. Manifestly, the question must not be approached on the basis that there is some underlying presumption that a husband is liable to support his wife and that an agreement to continue to do so ought necessarily to be inferred. I do not think that will do. If a wife deliberately chooses to walk out of the matrimonial home even with the tacit consent of her husband, it does not necessarily import that he has agreed to support her outside the matrimonial home. There is abundant authority for that proposition. But that is not this case. This is a case in which a husband, having already left home on an earlier occasion, has begged to be reinstated, and as a condition of reinstatement has agreed to a fixed sum by way of maintenance. I will assume that the agreement was varied, and that he was not in the wrong in the first instance in halving the amount which he had promised to pay, but that at the time immediately preceding the separation there was a *de facto* agreement to pay £3 at least for the maintenance of himself, his wife and the child. Then he is found by the justices to have packed his suitcase before the final quarrel, and to have done so with the deliberate intention of leaving the wife. There is a quarrel on Jan. 3 which resulted in his leaving, thus, as the justices find, wilfully bringing to an end the existing state of cohabitation. Now, if words mean anything (and there is ample evidence to support these findings) there is a clear concurrence of the intention to desert and the fact of separation wilfully brought about by the action of the husband. But the justices go on:

"The [husband's] action in leaving was not against the will of the [wife] as she had stated she had not wanted him to return in the first place [in May, 1952] but had given him a chance, and she did not wish him to return now [at the hearing]."

It seems to me that, even if that is to be taken to mean that she was a party to this separation, the natural implication from the facts is that she consented

to it only on the basis that the maintenance continued. To some extent that is recognised by the husband's own conduct in sending the maintenance of £1 a week, though, in my opinion, he had no right to limit that to the support of the child, and, if the finding that it was a consensual separation is correct, I should be prepared to hold that the surrounding circumstances lead to the inference that it was on the basis that the husband undertook to continue to support the wife and child.

But I do not think that this was a consensual separation. One does not need to rely on the authority of BUCKLEY, L.J., in a passage in *Harriman v. Harriman* (1) for the proposition that

"Desertion does not necessarily involve that the wife desires her husband to remain with her. She may be thankful that he has gone, but he may nevertheless have deserted her."

For that there is abundant authority, apart from that passage. It is one thing to say that this wife took the husband back reluctantly, and to give him a chance. Nevertheless, they resumed cohabitation and she was willing to continue the cohabitation so long as he supported her and the child, and she had done nothing, as I understand it, and nothing is found against her to the contrary, to depart from that attitude until, having made up his mind to go, the husband took advantage of a quarrel to leave her. Supposing, at the moment when he announced his intention of walking out of the house, the wife said: "Well, I don't mind your going. I shall be thankful to see the last of you. But let us understand what this means. What are you suggesting about the future?" and the husband said: "Please understand that the moment I am outside the front door I wash my hands of you altogether. I have no further liability to support you or the child". It is unnecessary to ask the rhetorical question: "What would her answer to that have been?" I decline to hold that she is to be taken to have consented to a parting on those terms; of course she did not; and to say that, because at the hearing of her charge of desertion she said she did not then want her husband back because of the way he had treated her in the past and was likely to treat her in the future, she was prevented from asserting that he had deserted her, is, in my opinion, to fly in the face of authority. I cannot see that there is any evidence of her consenting to a parting on the basis that the husband was entitled to shed his responsibility for her and the child. It is really a corollary of the corresponding question of the wilful neglect to maintain, and, in my opinion, the fundamental criticism of the justices' conclusion is that, for a wrong reason, as I think, they have found that the husband's intention to desert, put into effect by the fact of separation, was not desertion because the wife was not unwilling to see the last of him. That decision, in my opinion, was fundamentally wrong, and has given rise to the argument that the finding of wilful neglect to maintain is in conflict with the dismissal of the desertion charge.

The reality of the matter, in my opinion, is that on the facts of this case as found by the justices, the husband intended to desert, gave effect to that intention by the overt act of leaving the matrimonial home and of paying an inadequate amount by way of maintenance afterwards, and that there is nothing in the wife's conduct which disentitles her to charge the husband with desertion and to succeed on that basis as well as on the basis of wilful neglect to maintain.

For these reasons, whichever way one looks at it, in my opinion, this appeal fails and should be dismissed.

**PEARCE, J.:** I agree. The order based on wilful neglect to maintain can be supported on the narrow ground that on the admitted facts the justices could find wilful neglect to maintain the child. This would entitle them to make an order in favour of the wife. Since the order is for £1 10s. for the child (and £2 for the wife), it appears that the justices considered that to be the proper amount of maintenance. It follows that the £1 which the husband paid for the child unaccompanied by any provision for the wife cannot have been adequate maintenance for the child when one considers the added difficulty and expense of maintaining a child when the mother is forced to work to support herself.

The order can also be upheld on the broader ground of failure to maintain both wife and child. Starting from the principle laid down in *Baker v. Baker* (1) one has to investigate the facts of the case to see whether the circumstances of the separation (if it did not amount to desertion) raised the implication of a continuing liability by the husband to support his wife. When one considers the history of this marriage, and the background and the facts surrounding the parting as my Lord had set them out, I am led to the belief that, if there was any consensual separation, it was on the implied understanding by both parties that the husband's liability to support continued.

I agree also with what my Lord has said with regard to the issue of desertion. I think that the justices were wrong in drawing the inference that the wife consented to the parting. In my opinion, the husband's appeal must be dismissed and the wife's cross-appeal on the dismissal of her summons for desertion allowed.

*Appeal of husband dismissed. Cross-appeal of wife allowed.*

Solicitors: *Turner & Evans*, agents for *John Q. Clayton & Co.*, Luton (for the husband); *Lathom & Co.*, Luton (for the wife). G.F.L.B.

(1) (1949), 66 (pt. 1) T.L.R. 81.

## PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND PEARCE, J.)

Oct. 13, 14, 1953

### BAKER v. BAKER

*Husband and Wife—Summons for maintenance on ground of desertion—Expulsion from matrimonial home—Reasonable belief in husband's adultery induced by his conduct.*

*Desertion—Constructive desertion—Expulsion of wife from matrimonial home—Reasonable belief in husband's adultery induced by his conduct.*

A wife's belief, induced by her husband's conduct, that he has committed adultery justifies her, until that belief is proved to be without foundation, in leaving the matrimonial home and living apart from him, and entitles her to succeed in a claim against the husband for maintenance on the ground of his desertion.

*Glenister v. Glenister* ((1945) (109 J.P. 194) and observations of LORD MERRIMAN, P., in *Everitt v. Everitt* ((1949) (113 J.P. 279), applied.

**APPEAL** by the husband against a decision of a metropolitan magistrate sitting at the South Western Magistrate's Court on Feb. 20, 1953, whereby he found that the husband had deserted the wife.

The parties were married on Feb. 15, 1947. On Apr. 29, 1952, the wife left

the husband, and on Jan. 29, 1953, she issued a summons under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, alleging that the husband had deserted her on Apr. 29, 1952, and that he had wilfully neglected to provide reasonable maintenance for her. On Feb. 18, 1953, the wife caused a notice to be served by her solicitors on the husband as follows:

"Take notice that in compliance with the recent ruling of the High Court, we are now intimating to you that it may be necessary to produce evidence of adultery between yourself and a Mrs. [S.] . . . between January, 1951, and Apr. 29, 1952, in the forthcoming proceedings for desertion between your wife and yourself in the South Western Magistrate's Court."

At the hearing of the summons the wife stated in evidence that the marriage had been happy until about February, 1951; that in April, 1951, she suspected that the husband was associating with another woman; that they had had no sexual relations for a long while and he smelt of scent when he came home at night; that she questioned him about it and he said she was imagining things; that in August, 1951, she again noticed the same perfume and that the husband had again said she was imagining things and that he would have her in a mental home; that on Aug. 25, 1951, she arranged to meet the husband at a club after he had made a journey and that the speedometer of his car showed ten miles more than the journey he had described and she again noticed the same perfume; that in October, 1951, she asked the husband about a Mrs. S. and he said he knew no one of that name; that between October, 1951, and April, 1952, they had had no sexual relations and that when she had asked him he said he was not feeling well; that in April, 1952, he had said he would soon have her in a mental home, and that she should "take the lot" of a bottle of sleeping tablets; that on Apr. 29, 1952, she, accompanied by a friend, found the husband and Mrs. S. sitting together in the front of the car; and that she believed the husband had committed adultery. The husband denied that he had been intimate with Mrs. S., and said that he destroyed the sleeping tablets because he thought his wife "might overdo it"; that once he told her she was going mad; that he believed her aunt committed suicide; and that he did not think it would not distress her, the wife, to tell her that she was "going the same way as her mother and aunt." The magistrate found:

"Adultery not proved, but satisfied wife had reasonable grounds for suspecting he had committed adultery. *Glenister v. Glenister* (1)."

He, accordingly, found the husband guilty of desertion, and the husband now appealed against that finding.

*Miss M. Morgan Gibbon* for the husband.

*K. B. Campbell* for the wife.

**LORD MERRIMAN, P.**, stated the facts and continued: The legal question is: Who broke up the matrimonial home? The magistrate has found that the husband did, and the reasons he gives for his decision are:

"Adultery not proved, but satisfied wife had reasonable grounds for suspecting [husband] had committed adultery. *Glenister v. Glenister* (1)."

In order to make that statement of the reasons intelligible, it is necessary to point out that the wife, although charging her husband with, in effect, constructive desertion, on the ground that she had been driven from the matrimonial home had, a few days before the hearing, given notice to the husband by her solicitors

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.



"that in compliance with the recent ruling of the High Court, we are now intimating to you that it may be necessary to produce evidence of adultery between yourself and a [Mrs. S.] . . . between January, 1951, and Apr. 29, 1952, in the forthcoming proceedings for desertion between your wife and yourself in the South Western Magistrate's Court."

There was evidence that the wife had objected to what she believed was an improper association between her husband and this woman, and when it had been persisted in and lied about, as she asserted, she had withdrawn from cohabitation, as being, it was suggested, the only thing a decent woman could do. In my opinion, the magistrate was justified in saying, hypothetically and as a matter of law, that, if a man deliberately induces the belief that he is carrying on an adulterous association, and, in consequence, his wife leaves the matrimonial home, he can be held to have expelled her, and, therefore, to have deserted her, even though she fails to bring a charge, or to prove the fact, of adultery.

I myself should have thought that the simplest method of approaching this case was to find that the wife's story was true and the husband's story untrue, not only in relation to the association with this woman, but generally, and that the facts as a whole amply warranted holding that the wife had been expelled from the home. [His LORDSHIP considered the evidence and continued:] I should be prepared, on the evidence as a whole, to draw the inference which the learned magistrate has not directly expressed, that the husband had been guilty of conduct which could fairly be held to have expelled his wife from the home. But I must also deal with the specific point on which he decided this case, namely, that, although he was not satisfied that adultery had been proved, the wife had reasonable ground for suspecting that her husband had committed adultery. He founded his decision on *Glenister v. Glenister* (1). In that case a wife had charged her husband with desertion in a court of summary jurisdiction, and the husband's answer was: "She convinced me by her conduct that she was committing adultery, and in those circumstances I could not be expected to stay. Therefore, I am not a deserter". That view was supported by this court, in spite of the fact that the husband was not able to give in evidence one of the essential ingredients in his belief that she had committed adultery because the rule in *Russell v. Russell* (2) was still in force. Without going into unnecessary detail, he tried to get round that difficulty by a circumstantial inference from an alleged communication of a venereal disease. But the point is that this court decided, as a matter of principle that, although a husband may not be able to prove by admissible evidence that his wife has committed adultery, yet, if the conduct of the wife has been such as to create in the mind of the husband a reasonable belief that she has been guilty of a matrimonial offence, he has a sufficient defence to proceedings based on desertion.

In *Wood v. Wood* (3) I gave as an illustration of such conduct on the part of the wife the hypothetical case of a circumstantial confession by her of adultery which afterwards might be proved to be a lie, but which, so long as it held the field, justified the husband in withdrawing from cohabitation. That view of the matter was upheld in *Everitt v. Everitt* (4) by a Division of the Court of Appeal in which I was presiding, and it was approved by another Division

(1) 109 J.P. 194; [1945] 1 All E.R. 513; [1945] P. 30.

(2) [1924] A.C. 687.

(3) 111 J.P. 428; [1947] 2 All E.R. 95; [1947] P. 103.

(4) 113 J.P. 279; [1949] 1 All E.R. 908; [1949] P. 374.

of the Court of Appeal in *Allen v. Allen* (1). The point of the last case was that there was, at one time, reasonable belief, induced by the wife's conduct, that she had committed adultery, but that the issue had subsequently been tried and it was then held that she had not committed adultery. HODSON, L.J., who was sitting with SIR RAYMOND EVERSLED, M.R., and JENKINS, L.J., and gave the leading judgment, adopted the following passage from my judgment in *Everitt v. Everitt* (2):

"On this hypothesis the facts, at the earliest, were ascertained at the moment when the learned judge gave judgment. In *Wood v. Wood* (3) I called attention to this sort of position—a confession by the wife of adultery with every circumstantial detail fully justifying the husband's belief in the fact that she had committed adultery and, so long as that belief subsisted, entitling him to withdraw from, or to refuse to resume, cohabitation, but there might come a moment when, in spite of her confession, or, indeed, because of her oath that her confession had been false, and supported with equally circumstantial detail, a judge might hold that, not only was the charge of adultery not proved, but the wife had not, in fact, committed adultery. From that moment the fact has been ascertained and there is no longer any room for the belief, but that does not act retrospectively or retroactively. So long as the belief is reasonably and properly held, the husband's conduct and their respective rights in relation to cross-charges of desertion are regulated by the existence of the belief, though there may come a moment beyond which that is no longer possible."

In another passage in his judgment HODSON, L.J., emphasised what he described as the temporary nature of this defence. It subsists only until it is displaced by the facts being found in the sense opposite to the belief.

The learned magistrate has used the decision that in such circumstances a husband cannot be held guilty of desertion so long as the belief holds the field, so to speak, in reverse, to justify the proposition that the wife's charge against her husband of desertion cannot be displaced so long as a belief, induced by her husband's conduct, that he was committing adultery, held the field. In other words, he was saying that their respective rights in relation to cross-charges of desertion are regulated by the existence of the belief, a proposition which has twice been held by the Court of Appeal to be right.

In those circumstances, in my opinion, this appeal fails and should be dismissed.

PEARCE, J.: I agree.

*Appeal dismissed.*

Solicitors: *Lees, Smith & Matthew*, Croydon (for the husband); *S. C. Elphick* (for the wife). G.F.L.B.

(1) 115 J.P. 229; [1951] 1 All E.R. 724.

(2) 113 J.P. 279; [1949] 1 All E.R. 908; [1949] P. 374.

(3) 111 J.P. 428; [1947] 2 All E.R. 95; [1947] P. 103.



to have been stolen, contrary to s. 33 (1) of the Larceny Act, 1916". [His LORDSHIP stated the facts and continued:] What were stolen were stamps, and they were the property of Miss Cox. Those stamps were converted into money, and under s. 46 (1) of the Larceny Act, 1916, it is provided:

"The expression 'property' includes any description of real and personal property . . . and also includes not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

Obviously the Act was contemplating the theft of property which was then changed into some other property or into money, and that money being used to buy something else, because s. 46 (1) says:

" . . . not only such property as has been originally in the possession or under the control of any person, but also any property into or for which the same has been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

It is quite sufficient to say here, without going further, that this £4 10s. falls exactly into the definition of property converted or exchanged. Therefore, as the appellant knew that these notes had been acquired by theft, he was properly convicted and this appeal fails and is dismissed.

**SELLERS, J.:** I agree.

**HAVERS, J.:** I agree.

*Appeal dismissed.*

Solicitors: *A. P. B. Gould* (for the appellant); *Solicitor, Metropolitan Police* (for the respondent). T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SELLERS AND HAVERS, J.J.)

Oct. 13, 1953

ALMY *v.* THOMAS

*Dentist—Practice of dentistry—Unregistered person—Repair of denture—Impression of customer's mouth taken—"Treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth"—Dentists Act, 1921 (11 and 12 Geo. 5, c. 21), s. 1 (1), s. 14 (2).*

The respondent, who was not a registered dentist, undertook to repair the upper dental plate of a customer. He coated the denture with paste and asked the customer to place it in her mouth and bite as hard as she could, to allow the paste to set in conformity with the shape of her mouth, which she did. She then returned the plate to the respondent, who later replaced the paste with permanent plaster. At no time did the respondent touch the customer or touch the plate while it was in her mouth. Justices dismissed an information charging the respondent with unlawfully practising dentistry when unregistered under the Dentists Act, 1878, contrary to s. 1 (1) of the Dentists Act, 1921.

**HELD:** that the respondent had given to the customer "treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth" within the meaning of s. 14 (2) of the Act of 1921, and had, therefore, practised dentistry within the meaning of s. 1 (1). The case must, therefore, be remitted to the justices with a direction to convict.



**Per HAVERS, J.:** If the respondent could have re-lined the denture without asking the customer to replace it in her mouth and allow it to remain there so as to produce an impression, he would not have committed any offence.

*Twyford v. Puntchart* (1947) (111 J.P. 315) distinguished.

**CASE STATED** by Devon justices.

At a court of summary jurisdiction sitting at Torquay on May 4, 1953, the appellant, Percival William Henry Almy, preferred an information against the respondent, Frederick Douglas Thomas, charging that he, on a date between Dec. 18, 1952, and Jan. 18, 1953, not being registered under the Dentists Act, 1878, did unlawfully practise dentistry, contrary to the Dentists Act, 1921, s. 1 (1).

It was proved or admitted that the respondent had never been registered in the dentists register under the Dentists Act, 1878; that at all material times he held himself out to practise as a dental technician and repairer of dentures, and that outside the door of his premises was a notice reading: "F. D. Thomas, Dental Technician. Dental Repairs Received Here"; that in May, 1952, the respondent repaired the upper dental plate of a customer; that on Nov. 17, 1952, the same customer took the upper plate (to which were attached fourteen artificial teeth) to the respondent at his premises, since the plate was split and required repairing; that the respondent told the customer that the plate would have to be re-lined, which entailed the strengthening by thickening of the plate where the split had occurred, and the price of £2 was agreed; that the customer handed the plate to the respondent who took it to his laboratory and coated it with paste; that the respondent returned, handed the plate to the customer and asked her to replace it in her mouth and to bite as hard as she could, which she did; that the respondent left the customer for five minutes with the plate in her mouth to allow the paste to set in conformity with the shape of her mouth; that he then asked her to return the plate, which she did, after which she left the premises; that the respondent later replaced the hardened paste with permanent plaster; that the customer called at the premises, took possession of her plate and paid £2; that at no time did the respondent touch the customer nor touch the plate while it was in the customer's mouth; that the work done to the plate was a chemical binding, by which additional material was fixed to the top of the damaged plate.

On behalf of the appellant it was contended that the respondent had practised dentistry, contrary to the Dentists Act, 1921, s. 1 (1), since his conduct came within the definition of practising dentistry contained in s. 14 (2) of the Act. The respondent denied that he had practised dentistry within the meaning of that sub-section. The justices were of the opinion that (i) on the authority of *Twyford v. Puntchart* (1) and *Hennan & Co., Ltd. v. Duckworth* (2) work on an existing denture or the mere alteration of an existing denture did not amount to the practice of dentistry within the meaning of s. 14 (2); (ii) there had been no operation, treatment, advice, or attendance within the meaning of that sub-section; and (iii), accordingly, the respondent had not practised dentistry and the information would be dismissed. The appellant appealed.

*John Hobson* for the appellant.

*Sir Shirley Worthington-Evans* for the respondent.

**LORD GODDARD, C.J.:** The Dentists Act, 1921, s. 14 (2), provides:

"For the purposes of this Act, the practice of dentistry shall be deemed to include the performance of any such operation and the giving of any

(1) 111 J.P. 315; [1947] 1 All E.R. 773.

(2) (1904), 90 L.T. 546

such treatment, advice, or attendance as is usually performed or given by dentists, and any person who performs any operation or gives any treatment, advice, or attendance on or to any person as preparatory to or for the purpose of or in connection with the fitting, insertion, or fixing of artificial teeth shall be deemed to have practised dentistry within the meaning of this Act."

It is to be observed, as counsel for the respondent has stressed, that the word "denture" does not appear in that sub-section, but, as everybody knows, except in the operation known as crowning, artificial teeth are fitted to a person's mouth by means of a denture, and I do not think that it has ever been doubted that dealing with a denture can come within s. 14 (2). If it did not, there would be in the Act a very great gap which was never intended. It is conceded by counsel for the appellant that a mere work of repair can be done by a person who is not a registered dentist without contravening the Act. [His LORDSHIP stated the facts and continued:] Once you have a finding that the respondent left the customer for five minutes with the plate in her mouth to allow the paste to set in conformity with the shape of her mouth, it seems to me difficult to say that he was not taking an impression of her mouth. Why do dentists take impressions unless it is to fit the mouth with artificial teeth? In view of that finding, I find it impossible to say that the respondent did not give "treatment . . . or attendance . . . in connection with the fitting . . . of artificial teeth", and, therefore, I take a different view from that taken by the justices and hold that the offence was committed. The Case must be returned to the justices with an intimation to that effect.

**SELLERS, J.:** I agree. The distinction between this case and *Twynford v. Puntchart* (1) is fine, but, I think, definite. The facts show that there was evidence which required the justices to come to a different conclusion from that to which they did.

**HAVERS, J.:** I agree. If this work could have been done by the respondent simply by his taking the plate out and re-lining it without asking the customer to put it in her mouth and bite on it and allowing it to remain in her mouth for five minutes, and that was all that was done, in my opinion, there would have been no offence against the provisions of the Act, but it is plain from the finding of the justices that the re-lining was required to be performed in a number of stages, and I find it impossible to say that there was not "treatment . . . or attendance" within the meaning of the sub-section.

*Appeal allowed.*

Solicitors: *Waterhouse & Co.* (for the appellant); *Church, Adams, Tatham & Co.*, agents for *Lee-Barber, Goodrich & Co.*, Torquay (for the respondent).

T.R.F.B.

(1) 111 J.P. 315; [1947] 1 All E.R. 773.

## QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SELLERS AND HAVERS, JJ.)

Oct. 14, 1953

SPIERS *v.* WARRINGTON CORPORATION

*Education—School attendance—Duty of parent—Girl sent to school wearing trousers—Refusal of headmistress to admit without medical certificate—No medical certificate produced—Defences available to parent prescribed by statute—Relevance of reasonableness of parent's conduct—Education Act, 1944 (7 and 8 Geo. 6, c. 31), s. 39 (1) (2).*

An information preferred by a local authority charged a parent with contravening s. 39 (1) of the Education Act, 1944, in that his daughter, who was of compulsory school age, had failed to attend school. The parent sent the girl, who had suffered from rheumatic fever, to school wearing long trousers, but the headmistress refused to admit her unless a medical note was produced stating that the wearing of trousers was necessary, and she so informed the parent. The parent was also told that, alternatively, the girl could be sent for examination by the school medical officer. The parent refused to adopt either of these courses and continued to send the girl to school wearing trousers, with the result that she was sent home and so failed to attend school for considerable periods. Justices convicted the parent, but an appeal by him to quarter sessions was allowed.

HELD (i) that the headmistress, in refusing to admit the girl when wearing trousers, was acting justifiably in a matter of discipline which was within her competence, and that the sending of the girl to school by the parent in circumstances in which he knew she would not be admitted amounted to failure to send her to school.

*Saunders v. Richardson* (1881) (45 J.P. 782) applied.

(ii) that the defences now open to a parent were defined exhaustively by s. 39 (2) of the Act of 1944 and the question of the reasonableness or otherwise of the parent's conduct was irrelevant, and that, as none of those defences was available to the parent, he was guilty of an offence under s. 39 (1), and the conviction by the magistrates must, therefore, be restored.

*London County Council v. Maher* (1929) (93 J.P. 178) no longer applicable.

## CASE STATED by West Derby Quarter Sessions.

At a court of summary jurisdiction sitting at Warrington on Dec. 18, 1952, Ernest Spiers ("the parent") being the parent of Eva Spiers, a child of compulsory school age, on an information preferred by the Warrington Corporation ("the corporation") was convicted and fined 10s. for an offence under the Education Act, 1944, s. 39, in that between Oct. 13, 1952, and Dec. 3, 1952, the said child, who was a registered pupil at the Richard Fairclough Girls' Secondary Modern School, failed to attend regularly thereat. On appeal by the corporation the appeal committee allowed the appeal, and quashed the conviction.

At the hearing before quarter sessions the following facts were proved or admitted. Eva Spiers was born on July 13, 1939. In 1948 she contracted rheumatic fever. In August, 1950, she was registered as a pupil at the Richard Fairclough Girls' Secondary Modern School and attended there normally attired till October, 1950, when she again contracted rheumatic fever and was away from school under medical certificates till Oct. 1, 1951. After Oct. 19, 1951, the child's parents took her away for the rest of the term as they were anxious about her health. When they took medical advice, the doctor said she ought to be kept warm. Accordingly, on Jan. 7, 1952, the girl was sent to school by her parents wearing trousers. On that day the girl was seen by the head mistress, given certain advice about her dress, and sent home. She did not return to school till Feb. 12, 1952.

On Jan. 22 the parent and his wife were informed that their daughter

could not be admitted to school dressed in trousers unless a medical note was produced stating that they were necessary. Alternatively, the girl could be sent for examination by the school medical officer. No medical note was forthcoming, and the girl was not sent to the school clinic.

Article 9 (b) of the articles of government of the school stated:

"The head mistress shall control the internal organisation, management and discipline of the school . . ."

A rule made by the head mistress regulated the dress to be worn by all pupils, and it was proved that the head mistress considered trousers to be both unseemly and unhygienic dress for schoolgirls, but was ready to waive her objections if a medical note was produced.

On Jan. 31, 1952, the parent's wife appeared before the school attendance committee. She refused to obtain a medical note as to the necessity of her daughter's wearing trousers or to send her to the school clinic for examination and maintained that she was the best judge of what her daughter should wear.

It was contended for the parent that the school authorities had no power to exclude his daughter because of her dress; that, even if they had such power, no offence had been committed by the parent under s. 39 because the procedure (regarding the reporting of a suspension to the school governors) under the articles of government of the school had not been followed; that the parent was at all times willing to send his daughter to school when her health allowed; and that, in view of the child's attacks of rheumatic fever, the action of the parent was reasonable.

On behalf of the corporation it was contended that the rule made by the school authorities that girls could only attend school in trousers if such dress was recommended by a doctor was a reasonable rule and that the parent's failure to obtain a medical certificate and his refusal to allow his daughter to be examined by the school medical officer resulted in his daughter being sent to school in a condition in which the parent knew she would not be admitted.

The corporation now appealed to the Divisional Court.

*G. J. Bean* for the corporation.

*A. A. Edmondson* for the parent.

**LORD GODDARD, C.J.** (having stated the facts): In the first place, if I may refer to the old authorities, which are firmly established, *Saunders v. Richardson* (1) and *Fox v. Burgess* (2) decide that, if a parent sends a child to school in circumstances in which he knows that the child will not be admitted, he is then committing an offence because he is not causing the child to attend school regularly. *Saunders v. Richardson* (1) was decided before education was entirely free. In that case a parent who objected to paying for education insisted on sending the child to school without paying the necessary pence for the week's education. He knew quite well that the child would not be admitted unless he or she brought the money. It was held that that conduct amounted to a failure to cause the child to attend regularly, and **LORD COLERIDGE, C.J.**, in giving the leading judgment, said:

"It is idle to shut our eyes to the fact that the more limited construction would enable many unwilling parents to keep their children uneducated, by doing nothing but sending them to the door of the school under conditions which it is well known would prevent their being taken in."

(1) (1881), 45 J.P. 782; 7 Q.B.D. 393.

(2) 86 J.P. 66; [1922] 1 K.B. 623.



In this case, there is no question but that the head mistress had told the parents that she would not admit this child to the school dressed in this manner unless the child brought with her a note from a doctor to say that it was necessary that she should be dressed in that manner. The parents have never supplied such a certificate, and it is hardly to be supposed that any doctor could be found to say that it was essential to the child's health that she should wear trousers. The parents, therefore, continued to send the child to school in circumstances in which they knew she would not be admitted.

The school in question is a county secondary school, and the Education Act, 1944, s. 17, is relevant. It provides:

"(1) For every county school and for every voluntary school there shall be an instrument providing for the constitution of the body of managers or governors of the school in accordance with the provisions of this Act, and the instrument providing for the constitution of the body of managers of a primary school is in this Act referred to as an instrument of management, and the instrument providing for the constitution of the body of governors of a secondary school is in this Act referred to as an instrument of government . . . (3) Subject to the provisions of this Act and of any trust deed relating to the school:—(a) every county primary school and every voluntary primary school shall be conducted in accordance with rules of management made by an order of the local education authority; and (b) every county secondary school and every voluntary secondary school shall be conducted in accordance with articles of government made in the case of a county school by an order of the local education authority, and approved by the Minister, and in the case of a voluntary school by an order of the Minister; and such articles shall in particular determine the functions to be exercised in relation to the school by the local education authority, the body of governors, and the head teacher respectively."

Obviously a head teacher must be responsible for the discipline of the school, and, indeed, in this particular case the articles provide (by art. 9 (b)) that the head mistress

"shall control the internal organisation, management and discipline of the school . . . shall exercise supervision over the teaching and non-teaching staff, and shall have the power of suspending pupils from attendance for any cause which she considers adequate, but on suspending any pupil she shall forthwith report the case to the governors, who shall consult the local education authority."

I quote the last part about the time of suspension simply because quarter sessions seem to have thought that the head mistress in this case was suspending the girl and ought to have reported it to the governors, who should then consult the local education authority. In point of fact, I think that is a false point. The head mistress did not suspend this child. She was always willing to accept her, but she required that she should be properly dressed.

The Education Act, 1944, s. 39, which is now the governing provision, provides:

"(1) If any child of compulsory school age who is a registered pupil at a school fails to attend regularly thereat, the parent of the child shall be guilty of an offence against this section. (2) In any proceedings for an offence against this section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence

therefrom with leave or—(a) at any time when he was prevented from attending by reason of sickness or any unavoidable cause; (b) on any day exclusively set apart for religious observance by the religious body to which his parent belongs; (c) if the parent proves that the school at which the child is a registered pupil is not within walking distance of the child's home, and that no suitable arrangements have been made by the local education authority either for his transport to and from the school or for boarding accommodation for him at or near the school or for enabling him to become a registered pupil at a school nearer to his home."

In 1929 there was heard *London County Council v. Maher* (1), a case under the Education Act, 1921. Section 49 of that Act provided:

"Any of the following reasons shall be a reasonable excuse for the purposes of this Act and the bye-laws made thereunder, namely:—(a) That the child has been prevented from attending school by sickness or any unavoidable cause; (b) That there is no public elementary school open which the child can attend within such distance, not exceeding three miles, measured according to the nearest road from the residence of the child, as the bye-laws may prescribe. (c) In the case of non-compliance with a bye-law requiring a parent to cause his child to attend school, that the child is under efficient instruction in some other manner."

In *London County Council v. Maher* (1) the parents set up as an excuse for not sending their child to school a matter which was not covered by either para. (a), or para. (b) or para. (c), and the justices who heard the summons found that the excuse which the father had set up was a reasonable excuse. When the case came up on Case Stated, the court pointed out that s. 49 did not appear to be, if I may put it compendiously, exhaustive; it gave three excuses which the court must accept as defences, but it left it open to a parent to show other causes which the court might consider reasonable or not, and this court said that if the justices below had found that the excuse was reasonable, they could not go behind that finding. That is in accordance with the well-known rule of law on which this court always proceeds, that the facts are not for us. We are bound by the facts found by the justices, and they held that under the then law it was open to the justices to find any matter as a reasonable excuse if they liked.

I think quarter sessions approached this case bearing in mind *Maher's* case (1), but the law has been altered, and the Education Act, 1944, be it noted, is not a consolidating Act. The title to the Act is:

"An Act to reform the law relating to education in England and Wales",

and one of the changes that has been made is that s. 39 of the Act of 1944 has been substituted for s. 49 of the Act of 1921. It appears to the court highly probable that the reason for that was that it was considered desirable to get rid of the decision in *Maher's* case (1) and to substitute a new section for it, which would not leave it open to justices to find reasonable any excuse parents might set up, but would confine the excuses for not sending a child to school to the reasons set out in sub-s. (2) (a), (b) and (c). That is the only construction which this court feels able to put on s. 39 (2).

We were reminded of *Jenkins v. Howells* (2), which was heard in 1949 and is a case in which I was sitting with OLIVER and CASSELS, JJ. I do not hesitate to say that, in that case, if it had been open to us to find that there was a

(1) 93 J.P. 178; [1929] 2 Q.B. 97.

(2) 113 J.P. 292; [1949] 1 All E.R. 942; [1949] 2 K.B. 218.

reasonable excuse for not sending the child to school, we would so have found. It was a very hard case, but we felt that the statute was too strong, and that we could not go into the question of reasonableness. In the present case quarter sessions came to the conclusion

"That the appellant and his wife were acting reasonably in that they were acting in the interest of their child whose health and life they were seeking to safeguard, and that the Case was not made out."

They have attached to the Case a note of their judgment, from which it is obvious that they think that the head mistress was acting reasonably in insisting on uniformity of dress among the girl pupils of the school, but we are not here to balance which is the more reasonable or which is the more desirable. The head mistress obviously has the right and the power to prescribe the discipline for the school, and in saying that a girl must come to school not wearing a particular costume unless there is a compelling reason of health, surely she is only acting in a matter of discipline and a matter which must be within the competence of the head master or head mistress of any school, whether it is one of the great public schools or a county secondary or county primary school. If the question were whether parents reasonably believed that it was in the interests of the child to wear some particular dress, as I pointed out in the course of the argument, not in the least wanting to treat this matter as anything but serious, there are people in this country who believe, and honestly believe, that in the summer it is desirable in the interests of their children that they should wear no clothes at all except what the barest necessities of decency require. One sees in London squares, and certainly in the country, little children running about with no clothes except bathing slips, and one cannot suppose that a head mistress or head master would be obliged to admit children to school wearing no clothes at all. Yet, if the view put forward to quarter sessions were right, provided the parents honestly held that belief, and one could not say that it was unreasonable for the health of the child to be exposed to sunlight or wear no clothes in the summer, the head master or head mistress would be obliged to take any little boy or girl who came to school with no clothes. It would be an absurd position.

In my opinion, we must reverse the decision of quarter sessions and restore the decision of the justices in the court of summary jurisdiction because quarter sessions approached this matter from the wrong angle. They thought, perhaps following, as they thought they were entitled to follow, *Maher's* case (1), that the question was whether the parents had a reasonable ground to do what they did. That is not the question. The question is: Was the head mistress, in communicating her refusal to allow the girl to attend school in this way, acting within her rights? If we hold that she was not only within her rights, but that it was her duty, the parent, knowing that the child would not be admitted, and insisting on the girl being dressed in this way, brought himself within the reasoning in *Saunders v. Richardson* (2) and, accordingly, committed an offence. For these reasons we allow the appeal.

**SELLERS, J. :** I agree. It would appear that the appeal committee of West Derby Quarter Sessions approached their consideration of this matter on the authority of *London County Council v. Maher* (1), and that they considered the whole of the circumstances and came to the conclusion that the parent before them, Mr. Spiers, was acting reasonably. That case, as my Lord has

(1) 93 J.P. 178; [1929] 2 Q.B. 97.

(2) (1881), 45 J.P. 782; 7 Q.B.D. 393.

pointed out, is an authority under a different Act, the Education Act, 1921, whereas this matter falls to be considered under s. 39 of the Education Act, 1944, which is quite different and which does not, as I see it, leave it open to the tribunal to consider matters other than those that are there set down. This daughter of Mr. Spiers did, on the facts, fail to attend regularly at the school, and s. 39 (1) provides that in those circumstances the parent of the child shall be guilty of an offence against the section. But there is a further provision, as my Lord has pointed out, by s. 39 (2), that in proceedings for an offence under that section in respect of a child who is not a boarder at the school at which he is a registered pupil, the child shall not be deemed to have failed to attend regularly at the school by reason of his absence therefrom with leave or in the three particular cases set out. Those three cases cover a wide field of exemption from liability for non-attendance. The only one applicable for consideration by the appeal committee in this case was s. 39 (2) (a), i.e., the question was: Did the facts establish that at any time this daughter of Mr. Spiers was prevented from attending by reason of sickness or any unavoidable cause? On the facts, that excuse could not be established and the appeal committee came on the facts before them to an erroneous conclusion.

**HAVERS, J. :** I agree.

*Appeal allowed.*

Solicitors: *Sharpe, Pritchard & Co.*, agents for *J. P. Aspden*, town clerk, Warrington (for the appellants); *Piesse & Sons*, agents for *Browne, Sturgess & Wheeler*, Warrington (for the respondent).

T.R.F.B.

### QUEEN'S BENCH DIVISION

(LORD GODDARD, C.J., SELLERS AND HAVERS, JJ.)

Oct. 15, 1953

#### BILLING v. PILL

*Criminal Law—Larceny—Thing capable of being stolen—Property “attached to or forming part of the realty”—Hut secured by bolts to concrete base—Larceny Act, 1916, (6 and 7 Geo. 5, c. 50), s. 1 (3) (a).*

The appellant was convicted of stealing from a former gun emplacement a wooden army hut. The hut, which was comprised of seven sections, rested on a concrete base, the floor being secured to the base by bolts let into the concrete. After taking the hut to pieces with a view to removing it, the appellant did not at any time abandon possession of it.

**HELD**, that though the base had become part of the realty, the hut itself had been built for a temporary purpose and was not “attached to or forming part of the realty” within the meaning of s. 1 (3) (a) of Larceny Act, 1916; that it was, therefore, a thing capable of being stolen; and that the conviction was right.

**CASE STATED** by Cornwall justices.

At a court of summary jurisdiction sitting at Torpoint on Feb. 27, 1953, the respondent, James Arthur Henry Pill, a police officer, preferred an information against the appellant, Cecil Lloyd Billing, under s. 2 of the Larceny Act, 1916, charging that, between Jan. 1, 1951, and Oct. 31, 1952, at the parish of Antony, he stole an army hut, value £50, the property of the War Department. It was proved or admitted that the War Department possessed a site at Tregantle, near Torpoint, which was used during the war as a gun emplacement, when between forty and sixty huts were erected on the site. The hut



the subject of the charge was comprised of seven sections without doors or windows. It rested on a concrete foundation and the floor was secured to the concrete base by bolts let into the concrete. In 1946 the huts were vacated, but remained under the control of the War Department. Squatters, who moved into certain huts, were cleared from the site between 1947 and the end of 1952 by the St. Germans Rural District Council, acting on behalf of, and at the request of, the Ministry of Health. The method used was to take away the doors and windows of the unoccupied huts so as to deter further squatters, and to demolish those occupied by the squatters as they became vacant. In May or June, 1951, the appellant, without any lawful authority, by two of his servants demolished one hut which was without doors or windows, and, without abandoning possession thereof, took seven sections away and subsequently re-erected the hut on his own land. It took three days to dismantle the hut and remove the sections.

It was contended on behalf of the appellant that under s. 1 (3) (a) of the Larceny Act, 1916, the hut was not capable of being stolen as it was attached to or formed part of the realty, and, although he had severed it from the realty, he had not abandoned possession of it prior to removing it from the site. It was contended on behalf of the respondent that the hut was not attached to or forming part of the realty so as to prevent its forming the subject of a charge under s. 2 of the Larceny Act, 1916.

The justices convicted the appellant, and he now appealed.

*Huntley* for the appellant.

*P. M. Wright* for the respondent.

**LORD GODDARD, C.J.**, stated the facts and continued: The finding of the justices is:

"We were of opinion that the hutted camp was a temporary camp and that the huts were movable buildings which did not form part of the realty. We were of opinion that the hut in question was a purely temporary structure which was capable of being stolen within the provisions of s. 2 of the Larceny Act, 1916, and it is on this point that the appellant has required this Case to be stated."

The Larceny Act, 1916, it must be remembered, was intended to be a consolidating Act and was not intended to alter the law in any way. There are dicta in some cases in the Court of Criminal Appeal of *Avory, J.* (who, it is well-known, was the draftsman of the Act), that it was not intended to alter the law of larceny. Under the old common law of larceny, there were many difficulties in the way of preferring a charge of theft in respect of anything which, if I may use a convenient expression, savoured of the land. A great many additions were made to the law from time to time by statute, and most of them will be found in s. 8 of the Act of 1916. We are concerned with s. 1 (3), defining the offence of larceny:

"Everything which has value and is the property of any person, and if adhering to the realty then after severance therefrom, shall be capable of being stolen . . ."

If one stops there, it is clear that anything adhering to the land that can be severed is capable of being stolen. Then there is a proviso, which has given rise to the difficulty in this case:

"Provided that—(a) save as hereinafter expressly provided with respect

to fixtures, growing things, and ore from mines, anything attached to or forming part of the realty shall not be capable of being stolen by the person who severs the same from the realty, unless after severance he has abandoned possession thereof . . ."

The construction I put on that sub-section is that things which adhere to the realty can be stolen after they have been severed, but a person who actually severs them (subject to the provisions of s. 8 and one or two other sections with which we are not concerned) cannot be convicted of larceny unless, after the severance, he has left them on the land and then gone back, on what I may call a separate excursion, and taken them. When he left them, they reverted to the possession of the person on whose land they were. Therefore, I think the whole of this case comes down to the meaning of the words "anything attached to or forming part of the realty". Those words might be read as meaning "attached so as to form part". It seems odd that a thing can be attached to the realty and yet not form part of it. If it is attached to the realty and may form part thereof, we have to consider whether it is attached to the realty in the sense in which those words are used in this sub-section.

In my opinion, the proviso is aimed at preserving the old common law position that one cannot be charged with stealing real property. What is real property? Land, we all know, is real property and if objects are so attached to the land that they become part of the land, then those objects become, for instance, as between a landlord and tenant, landlord's fixtures, as they are sometimes called. I do not need to go into the elaborate distinctions that were dealt with by LORD ELLENBOROUGH, C.J., in *Elwes v. Maw* (1), as to how fixtures pass between mortgagor and mortgagee and landlord and tenant. The point is: Is the object a fixture? What is a fixture? First, the commonest fixture is a house. A house is built into the land, so the house, in law, is regarded as part of the land; the house and the land are one thing. Anything which is an integral part of the house, such as, for instance, lead pipes, will also be a fixture and will be attached to or form part of the land. A thing which, in its nature, is a chattel may or may not be a fixture. If it is affixed in some way, the true test, it seems to me, is: Was it meant to be a temporary fixture, and not part of the house or the land? In a house it may be for decoration. Many questions have arisen as regards such things as tapestries, fireplaces, and ornamental chimney-pieces. I think the matter is summed up admirably in HALSBURY'S LAWS OF ENGLAND, Hailsham ed., vol. 20, p. 97, para. 107, by DU PARCQ, J.:

"Whether a chattel has been so affixed to the land or buildings as to become a fixture depends on the object and purpose of the annexation, and if the chattel can be removed without doing irreparable damage to the premises, neither the method nor the degree of annexation, nor the quantum of damage that would be done to the chattel or to the premises by the removal, affect the question save in so far as they throw a light upon the object and purpose of the annexation. If the object and purpose was for the permanent and substantial improvement of the land or building, the article will be deemed to be a fixture, but if it was attached to the premises merely for a temporary purpose or for the more complete enjoyment and use of it as a chattel, then it will not lose its chattel character and it does not become part of the realty."

(1) (1802), 3 East. 38.

That is a useful exposition of the law, and if one wants authority to support it, a very good instance is *Holland v. Hodgson* (1), where BLACKBURN, J., than whom there was no higher authority on these matters, giving his judgment also emphasised that one has to consider the circumstances.

Can anybody doubt that the hut in question was put there for a temporary purpose? It can be removed without doing any damage to the freehold. It is resting on a concrete bed which is let into the land. I should say there is no question that the concrete bed has become part of the land, but this hut which stands on it has not become part of the land merely because some bolts have been put through the floor to stabilise or steady the hut. It was put there merely for a temporary purpose so that soldiers, who were going there for a presumed temporary purpose to man a gun emplacement during the war, would have somewhere to sleep. In my opinion, it would be wrong to hold that this hut was attached to or formed part of the realty. It was not attached to the realty any more than a garden seat which, because it is likely to be blown over, one secures to the ground by driving a spike through it. In one sense that is an attachment, but it is not an attachment making the seat part of the realty. This hut was a chattel, remained a chattel, and is capable of being stolen. Therefore, the justices came to a right decision in law in convicting the appellant.

SELLERS, J.: I agree.

HAVERS, J.: I agree.

*Appeal dismissed.*

Solicitors: *Reed & Reed*, agents for *Caunter, Venning & Harward*, Liskeard (for the appellant); *Jaques & Co.*, agents for *Stephens & Scown*, St. Austell (for the respondent).

T.R.F.B.

(1) (1872), L.R. 7 C.P. 328, 331.

#### NOTE

### PROBATE, DIVORCE AND ADMIRALTY DIVISION

(LORD MERRIMAN, P., AND COLLINGWOOD, J.)

Oct. 22, 1953

#### STRETTON *v.* STRETTON

*Husband and Wife—Appeal—Notes of evidence—Exhibits—Documents produced before justices—Need to make exhibits to notes.*

APPEAL by the husband against an order, dated June 15, 1953, of Norfolk justices sitting at East Harling.

On Aug. 3, 1948, the justices made an order under the Summary Jurisdiction (Separation and Maintenance) Acts, 1895 to 1949, in favour of the wife on the ground that the husband had wilfully neglected to provide her with reasonable maintenance, and granted her, *inter alia*, custody of the two children of the marriage. On Nov. 8, 1948, that order was varied by granting custody of the children to the husband. On June 15, 1953, the order was again varied

by granting custody of the children to the wife. Against that decision the husband now appealed.

*Stimson* for the husband.

*R. M. O. Havers* for the wife.

**LORD MERRIMAN, P.:** I wish to deal by way of preface with a matter to which we have to refer too frequently. There is attached to the notice of motion stating the grounds of appeal a reply from the clerk to the justices, in response to the usual inquiry from the registry, stating that no exhibits were handed in to the court. The notes of evidence show that several documents were produced and handed to the court which were not, as they should have been, made exhibits and sent to us as such. Some of them are extremely important documents. One is the school report of the elder child, a girl, whose educational future is very much one of the matters to be taken into account in considering the paramount question, the welfare of the children. The others concern the relations, whatever they may be, of the husband with a German woman, said by him to be a domestic servant in the house. There is a bundle of letters written before Aug. 3, 1948, which, though they were not all read, were, we are told, produced at the hearing. We have looked at one of them, dated May 7, 1948, which happened to be the one on the top of the pile. It is a fervent love-letter, which affords some confirmation of the wife's statement that the husband's association with this young woman was responsible for the break-up of the marriage in 1948. It is admitted that the others are in the same sense. There was also a bundle of correspondence, about which the husband was cross-examined, between himself and the Home Office, which shows conclusively that he was representing to the Home Office that he wished a passport to be granted to the German woman on the basis that she was his fiancée and that they were about to get married as soon as possible.

[HIS LORDSHIP then dealt with the merits.]

Solicitors: *Gregory, Rowcliffe & Co.*, agents for *A. D. Foxon*, Leicester (for the husband); *Ford, Michelmores, Rose & Binning*, agents for *Greenland, Houschen & Co.*, Attleborough, Norfolk (for the wife).

G.F.L.B.

## COURT OF CRIMINAL APPEAL

(LORD GODDARD, C.J., SELLERS AND HAVERS, JJ.)

Oct. 5, 19, 1953

### REG. v. NEWLAND AND OTHERS

*Criminal Law—Conspiracy—Effecting public mischief—Conspiracy to obtain and sell in England pottery which could lawfully be sold for export only—Common law misdemeanour alleged by particulars—Validity of indictment—Domestic Pottery (Manufacture and Supply) Order, 1947 (S. R. & O. 1947, No. 373), art. 1, art. 2, art. 5 (as amended by S.I. 1948, No. 1616).*

*Criminal Law—Trial—Summing up—Long and complicated case involving number of defendants—Case of each defendant dealt with separately—Verdict taken after each individual portion of summing-up—No separation of jury after retirement to consider individual verdict.*



The appellants were convicted on two counts on an indictment in each of which the statement of offence alleged a "conspiracy to effect a public mischief" and the particulars alleged that they had conspired together and with other persons not before the court by fraudulent means to obtain and by dishonest means to distribute to the home market domestic pottery, contrary to the Domestic Pottery (Manufacture and Supply) Order, 1947 (which forbade manufacturers to supply such pottery except for export). The evidence established that the appellants obtained the pottery either from registered exporters or manufacturers by false representations that it was intended for export, that it then went to one of three firms controlled by one or more of the appellants, and was then sold to retailers under false documents and invoices in which the goods were described as frustrated or rejected exports. The order of 1947 did not specifically provide a penalty for a person who obtained decorated pottery from registered exporters or manufacturers by the representation that it was intended for export, and then sold to the home market, or for a person who made a false declaration in connection with such obtaining.

HELD, that the offence charged in each count could have been charged as conspiracy either to effect an unlawful purpose, or by dishonest devices to deflect the intention and purpose of a statute, or to work to the prejudice of the State, any of which conspiracies would have constituted a common law misdemeanour, and that the indictment as laid was valid.

Per curiam: the right approach to "public mischief" cases is to regard them as part of the law of conspiracy and to hold the actions of an individual not committed in combination with others to be indictable only if they constitute what has been held in the past to be a common law or statutory offence.

Dictum of SOULDON LAWRENCE, J., in *Rex v. Higgins* (1801) (2 East, 21) and *Rex v. Manley*, (1933) (97 J.P. 6) criticised.

In his summing-up the judge first gave a general outline of the case, and then dealt with the case of each individual defendant, and after he dealt with an individual defendant directed the jury to return a verdict in the case of that defendant, and after that verdict had been returned proceeded to deal with the case of the next defendant, so that a series of separate verdicts was returned, but in no case did the jury separate when considering an individual verdict.

HELD, that, having regard to the length and complexity of the case, the course adopted by the judge was proper.

*Rex v. Neal*, (1949) (113 J.P. 468) distinguished.

#### APPEALS against conviction.

The appellants, Alfred Ernest Newland, Robert Norman Hawes, Ralph Stanislaw Andrew Dean, Vernon Egerton Roland Blunt, Clifford Malcolm Waight, Gerald Edgar Waight, Disposals, Ltd., and Dean, Devitt, Gilbert & Co., Ltd., were convicted at the Central Criminal Court on two counts of an indictment, each of which charged them of conspiracy to effect a public mischief. The particulars of offence in each count and the facts of the case, which are outlined in the headnote, appear fully in the judgment.

*Ashe Lincoln, Q.C.*, and *K. A. Richardson* for the appellants, Dean and Hawes. *K. A. Richardson* for the appellant, Blunt.

*Sachs, Q.C.*, *Faulks* and *Hirst* for the Crown.

The other appellants were not represented by counsel.

*Cur adv. vult.*

Oct. 19. LORD GODDARD, C.J., read the following judgment of the court. The court has already dismissed these appeals and now proceeds to give its reasons. The appellants were all convicted before GLYN-JONES, J., at the Central Criminal Court in April on an indictment containing thirteen counts, but a verdict was taken on only two of them. On the first count the statement of offence was

"Conspiracy to effect a public mischief"

and the particulars were that all the appellants between May 1, 1947, and July 15, 1948, conspired together and with certain persons not before the court by fraudulent means to obtain, and by dishonest devices to distribute to the

home market, that is, for eventual retail sale within the United Kingdom, decorated domestic pottery which was not, by reason of the Domestic Pottery (Manufacture and Supply) Order, 1947, whereby the said pottery was only available for sale for currency other than that of the United Kingdom, or under any licence granted by the Board of Trade, available for such supply. The second count charged them with a similar conspiracy, the particulars referring to a later date and not only to the order of 1947, but also to an amending order of 1948, the amendments not being material to this appeal. Some of the appellants were convicted on both counts, others who were alleged to have entered the conspiracy at a later date only on count 2. Again, for the purposes of this appeal this is immaterial and the cases of all the appellants stand on the same footing.

It would be convenient at the outset to refer to the order mentioned in the indictment. The Domestic Pottery (Manufacture and Supply) Order, 1947, which is dated Mar. 1, 1947, was made by the Board of Trade in pursuance of powers conferred by reg. 55 of the Defence (General) Regulations, 1939, which was kept in force by virtue of the Supplies and Services (Transitional Powers) Act, 1945. Article 1 (1) provides:

"No manufacturer shall manufacture any domestic pottery except under the authority of a licence issued by the Board of Trade under this paragraph and in accordance with any condition attached to that licence."

By art. 2 it is provided:

"Except under the authority of a licence issued by the Board of Trade under this article and in accordance with any condition attached thereto, no manufacturer shall supply any domestic pottery manufactured by him other than undecorated domestic pottery of a description specified in sched. II hereto."

Article 5 provides:

"(1) The provisions of this order except para. (1) of art. 1 shall not apply to the manufacture or marking of domestic pottery of any description intended for supply, or to the supply of any such goods . . . (b) to the holder of an exporter's certificate issued for the purposes of this article by the Board of Trade, being a person who when placing his order for the goods indorsed it with the words 'for export'. (2) A person referred to in heading (b) of the preceding paragraph shall not supply any domestic pottery in respect of which his order was indorsed 'for export' otherwise than by such exportation."

The order of 1948, made on July 13, 1948, amends the previous order by providing in an explanatory note that any domestic pottery may be supplied without a licence to the holder of an exporter's certificate who surrenders a document, signed and dated by him, clearly indicating that he requires that pottery for export, and by providing that a person so supplied may not supply that pottery except by export.

The object of these orders is clear enough and is designed to assist what was and is commonly known as the export drive. Decorated domestic pottery was a desirable and valuable export which could be sold in overseas markets and thus assist this country to obtain foreign exchange, and, therefore, it was desired to restrict or even prohibit the sale of this commodity on the home market so as to increase the amount available for export. No doubt, this was a policy of the government, but it was a policy authorised by Parliament as the

Board of Trade were able to issue the regulations by virtue of the statute referred to therein. Parliament must also be taken to have approved the orders as no prayer was presented against them and it has been recognised over and over again that statutory rules and orders, if *intra vires* the Act under which they are made, have exactly the same effect as though they were contained in the enactment itself. There has never been any suggestion that these orders were *ultra vires*. It is to be observed, and this is a matter of importance, that the orders in terms deal only with manufacturers or persons holding export certificates from the Board of Trade and who were referred to in the trade as registered exporters. They may only supply decorated pottery for export. The orders do not in terms deal with a person who obtains from a manufacturer or registered exporter these goods, representing that they are for export, and then, having obtained them, sells them on the domestic market. But it is obvious that, if persons who falsely represent that they intend to export the goods and thereby obtain supplies of them could then with impunity sell the goods in this country, the whole scheme would break down and the object of the legislature would be defeated. Moreover, such conduct on the part of traders who set to work dishonestly by false and deceptive documents and devices to obtain and deal with goods contrary to the clear intention of the orders must work serious prejudice to the reputable members of the trade who are carrying on their business in accordance with the law. We may also say at once that it is no answer to the allegation that the appellants were acting fraudulently in this matter to say that the persons who supplied the goods in the circumstances which I shall mention in a moment were not defrauded merely because they were paid the full invoice price. It is enough to show that they would not have acted as they did but for the false representations and dishonesty of the persons who obtained the goods for them. This is so clear that we do not propose to enlarge on it.

The facts which were proved in this case are that the goods came either from registered exporters or from manufacturers, though mainly from the former. A registered exporter who had obtained decorated pottery was not obliged himself to export, but might sell to anyone who gave him an appropriate declaration that he intended to export the goods. No penalty is prescribed for the giving of a false declaration. The appellants were proved either to have given or to have been party to false declarations that the goods were wanted for export and in addition to that to have given or to have been party to giving their suppliers false shipping marks and in some cases false names of vessels in which the goods were purported to be shipped, or to have taken part in the disposal on the home market of the goods so dishonestly obtained from the manufacturers. In fact, these goods went to three firms or companies who were registered, but were proved to have been parties to the fraud. These companies were Dean, Devitt, Gilbert & Co., Ltd., who were charged on both counts as conspirators, Disposals, Ltd., who were charged in the second count only, and Wilfred Hawes & Co., Ltd., a company with which the appellant, Robert Norman Hawes, was connected or controlled. The goods were, in fact, taken to, or were already at, a wharf and then were distributed to firms controlled by the appellant, Clifford Malcolm Waight, and sales to retailers were effected by means of bogus documents and invoices falsely describing the goods as rejected or frustrated exports. It was the case for the prosecution that by these means the appellants were enabled to dispose of decorated pottery to the value of no less than £70,000, the result of which, of course, was that the total of this commodity available for export was decreased by that amount.

Two main grounds of appeal were taken on behalf of the appellants before us: (i) that the charge of conspiracy to effect a public mischief was a crime not known to the law, and, as an alternative, that at least the particulars of the offence did not support a charge known to the law. We will deal with this point before considering the second ground which related to a matter of procedure only. It is much too late to object that a conspiracy to effect a public mischief is an offence unknown to the law. There have been at least three reported cases during the present century in which that charge has been made and convictions upheld. We refer to *Rex v. Brailsford* (1), *Rex v. Porter* (2), and *Rex v. Bassey* (3). There is also *Rex v. Manley* (4), in which there was a charge of effecting a public mischief, but no charge of conspiracy, and we propose to consider that case entirely separately. The court is well aware of the caution with which they should approach the consideration of an offence which is alleged to consist of doing acts which tend to effect public mischief as, if extended, it might enable judges to declare new offences which should be the business of the legislature. The objections to such a course were forcibly pointed out by SIR FITZJAMES STEPHEN, the most prominent institutional writer on the criminal law in the last century, in his *HISTORY OF THE CRIMINAL LAW*, vol. 3, p. 359.

We think we may say that the court should approach the subject at least with the same degree of caution as must be exercised when considering a plea in a civil action that something has been done contrary to public policy. Indeed, nowadays we know that matters which are to be regarded as contrary to public policy, so, for instance, as to invalidate a contract, must be found in cases decided in the past and no additions are now to be made. No one has ever attempted to define what may or may not constitute a public mischief and we have certainly no desire to increase the number of criminal offences by adding to the category of misdemeanours, but there are two points which, in our opinion, do not make it necessary for us to consider whether there is here any attempt to create a new offence. In the first place, it is well known that there may be many acts which, if done by an individual, would not be indictable, or even actionable as a tort, and yet may become both actionable and criminal if done by a combination of persons as the result of a conspiracy, and for this really elementary proposition we need only refer to *Quinn v. Leathem* (5). Many other illustrations are to be found both in the old and in the more modern reports, for instance, *Vertue v. Lord Clive* (6), *Clifford v. Brandon* (7), the note to *Rex v. Leigh* (8), *Mogul S.S. Co. v. McGregor, Gow & Co.* (9) and *South Wales Miners' Federation v. Glamorgan Coal Co.* (10). A conspiracy consists of agreeing or acting in concert to achieve an unlawful act or to do a lawful act by unlawful means. Can anyone doubt that, if persons conspire to obtain a commodity for sale in this country by false representations and fraudulent documents when legislative enactments provide that except under licence it is only to be sold for export, they are not using unlawful means to effect the end in view?

(1) 69 J.P. 370; [1905] 2 K.B. 730.

(2) 74 J.P. 159; [1910] 1 K.B. 369.

(3) (1931), 47 T.L.R. 222.

(4) 97 J.P. 6; [1933] 1 K.B. 529.

(5) 65 J.P. 708; [1901] A.C. 495.

(6) (1769), 4 Bun. 2472.

(7) (1809), 2 Camp. 358.

(8) (1775), 1 Car. & Kir. 28n.

(9) (1883), 53 J.P. 709; 23 Q.B.D. 598.

(10) [1905] A.C. 239.



Secondly, in *HAWKINS' PLEAS OF THE CROWN*, vol. 1, p. 446, a work of great authority, it is stated:

"There can be no doubt, but that all confederacies whatsoever, wrongfully, to prejudice a third person are highly criminal at common law, as where divers persons confederate together by indirect means to impoverish a third person."

This passage was quoted in the judgment of *FRY, L.J.*, in *Mogul S.S. Co. v. McGregor, Gow & Co.* (1) and that judgment is very much in point in this case. He was dealing with indictable conspiracies and refers to *Rex v. Sterling* (2). He quotes (*ibid.*, 631) the explanation of that case given by *HOLT, C.J.*, in *Reg. v. Daniell* (3) that:

"The real ground of the decision was . . . that the offence of the defendants [i.e. the conspiracy] was of a public nature and levelled at the government . . ."

and that is exactly the case here. The third person injured and impoverished here is the State or, as *HOLT, C.J.*, called it, the government. The statement of offence in both these counts might have consisted simply of conspiracy to commit a common law misdemeanour and the particulars thereunder plainly show the constituents.

In upholding these convictions, therefore, we are in no way creating a new offence. The particulars sufficiently allege a common law misdemeanour, namely, conspiracy, and whether the matter is looked at simply as a conspiracy to effect an unlawful purpose or a conspiracy by dishonest devices to defeat the clear intention and purpose of an Act of Parliament or to work to the prejudice of the State, in our opinion, they disclose offences which have long been known to the common law of this country. Counsel for the appellants tried to compare this case with one in which persons devised plans for avoiding surtax or death duties, and quoted *LORD TOMLIN's* well-known dictum in *Inland Revenue Comrs. v. Duke of Westminster* (4). But the cases are in no sense analogous. What the noble and learned Lord laid down was that, if a man can order his affairs so that the tax attaching under the particular Acts was less than it otherwise would be, then, however unappreciative the Commissioners of Inland Revenue or his fellow taxpayers might be of his ingenuity, he cannot be compelled to pay the increased tax. But in that case the taxpayer had done nothing dishonest, nothing false, nothing deceptive. The only question in the case was as to the legal effect of certain admittedly genuine deeds. They were held to create an obligation to pay annuities, not salary or wages and consequently the taxpayer was entitled to deduct the payments in arriving at the total income for surtax purposes. Openly and without fraud of any kind he had become entitled to certain deductions from his income.

We cannot leave this part of the case without referring to *Rex v. Manley* (5), a case binding on this court though it has been subject to considerable criticism. The facts were that the defendant, a woman, had given false information to the police that she had been assaulted and robbed, thereby causing officers of the police to waste their time investigating a bogus crime and exposing individuals answering to the description of the pretended robber to suspicion. In upholding

(1) (1883), 53 J.P. 709; 23 Q.B.D. 598.

(2) (1663), 1 Lev. 125.

(3) (1704), 6 Mod. Rep. 99, 182.

(4) [1936] A.C. 1, 19, 20.

(5) 97 J.P. 6; [1933] 1 K.B. 529.

the conviction this court held that such conduct amounted to a misdemeanour, namely, effecting a public mischief. They were relying on a dictum of SOULDON LAWRENCE, J., in *Rex v. Higgins* (1) as well as on *Rex v. Brailsford* (2) and *Rex v. Porter* (3). The dictum in *Rex v. Higgins* (1) was that all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the public are indictable, but no other member of the court stated the law in such wide terms. It is the breadth of that dictum that was so strongly criticised by SIR FITZJAMES STEPHEN in the passage in his HISTORY OF THE CRIMINAL LAW to which we have already referred and also by DR. STALYBRASS in 34 L.Q.R. 183. In effect, it would leave it to the judges to declare new crimes and enable them to hold anything which they considered prejudicial to the community to be a misdemeanour. However beneficial that might have been in days when Parliament met seldom, or at least only at long intervals, it surely is now the province of the legislature and not of the judiciary to create new criminal offences. The Council, or as it was more generally termed, the Court of Star Chamber, in its time rendered considerable service to the criminal law by declaring some matters, notably perjury, to be misdemeanours though they never attempted to create new felonies. But conditions now are wholly different. The actual decision in *Rex v. Higgins* (1) was that an incitement to commit a felony was a misdemeanour. The court showed that it was firmly established by decisions that an attempt to commit a misdemeanour was in itself a misdemeanour and applied that doctrine to attempts to commit felony and held that the solicitation was in itself an act sufficient to prevent the application of the doctrine that mere intention unaccompanied by some act would not support an indictment for an attempt. No one would criticise the actual decision, but the very wide dictum to which we have referred is unnecessary to support it. The short judgment in *Rex v. Manley* (4), while referring to *Rex v. Brailsford* (2) and *Rex v. Porter* (3), apparently overlooked, or, at any rate, makes no mention of what, in our opinion, was an all-important factor in those cases, namely, that in both there was a charge of conspiracy. With all respect to a case which, as we have said, is binding on us, we believe that the right approach to what may be compendiously called public mischief cases is to regard them as part of the law of conspiracy, and to hold the actions of an individual not committed in combination with others as indictable only if they constitute what has been held in the past to be common law or statutory offences. It may be that *Manley's* case (4) will some day be considered by the House of Lords and in any case we venture to think that it would be a useful reform if such conduct as was there disclosed were made a summary offence by the legislature. We need not further enlarge on it as the charge we are now considering was one of conspiracy except to say that, in our considered opinion, the safe course is no longer to follow it.

We now pass to the second ground of appeal. What is challenged is the action which the learned judge took in summing-up the case. He started his summing-up, with all the appellants in the dock, by giving the jury a general outline of the case and a charge on the law, and no fault is found with his direction. He then proceeded to deal with the case of each defendant separately and took separate verdicts thereon. For instance, he first dealt with the case of Clifford Waight and having summed up the evidence with regard to that defendant he sent the jury out to consider their verdict against him. When

(1) (1801), 2 East. 5.

(2) 69 J.P. 370; [1905] 2 K.B. 730.

(3) 74 J.P. 159; [1910] 1 K.B. 369.

(4) 97 J.P. 6; [1933] 1 K.B. 529.

the jury returned with a verdict of Guilty that defendant was sent down and the judge started to sum up the evidence against the second defendant, again taking a separate verdict, and so on against all of them. His summing-up occupied altogether three days, and at the conclusion of each day the jury were allowed to separate and to come back the following morning. They in no case separated while they were considering a verdict.

We can see no objection in law to the course which the learned judge took. It was, no doubt, unusual, but so also was the case. It had taken the better part of six weeks to try, a mass of documents had to be considered and the case was one of great complexity. To have thrown, so to speak, the whole of the case at the jury, leaving them to sort out afterwards the evidence against each defendant, would have been neither in the interests of the defendants themselves nor in the interests of justice. It was part of the learned judge's duty to remind the jury that they would have to consider the case of each man separately. It would have been impossible for the jury to have done so with a case of this description except by the course which the learned judge took. It was objected that this offended against the decision in *Rex v. Neal* (1), but, in our opinion, that case has no application to what happened here. In *Neal's* case (1) the recorder, having concluded his summing-up and enclosed the jury in charge of the bailiff, allowed them to separate and go out into the town for refreshment. The court felt obliged to hold that that was so contrary to established practice that the conviction could not be allowed to stand, applying the words of LORD SUMNER in *Crane v. Public Prosecutor* (2) that

" . . . to deprive an accused person of the protection given by essential steps in criminal procedure "

leaves the court no option but to quash the conviction. But what was done here amounted to no more than this: when the judge had summed up against the first defendant and taken the verdict the case was still part heard against all the other defendants and so it remained against each defendant until a verdict had been taken against him. It is well known nowadays that judges very often break off their summing-up to enable the jury to obtain refreshment, or, if it has become late, to let them go home and consider the verdict fresh next morning though it may be that very little remains to finish the summing-up. Once the summing-up is finished and the jury enclosed they must not be allowed to separate, but we can see no reason why the jury should not be allowed to depart at night, though the summing-up is concluded and a verdict taken against one, while the case still remains part heard against the others. In our opinion, there is nothing in this objection. We cannot forbear from expressing our appreciation of the way in which GLYN-JONES, J., dealt with a case of extraordinary length and complexity.

*Appeals dismissed.*

Solicitors: *Randolph & Dean* (for the appellants, Dean and Hawes); *Freeborough & Co.* (for the appellant, Blunt); *Solicitor, Board of Trade* (for the Crown).

T.R.F.B.

(1) 113 J.P. 468; [1949] 2 All E.R. 438; [1949] 2 K.B. 590.

(2) 85 J.P. 245; [1921] 2 A.C. 299, 331.